IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Case No. 08-13141(KJC)
	)	
	)	
TRIBUNE COMPANY	)	Chapter 11
	)	
	)	Courtroom 5
	)	824 Market Street
Debtors.	)	Wilmington, Delaware
	)	
	)	April 13, 2011
	)	10:00 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDGE KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

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WILMINGTON, DELAWARE, WEDNESDAY, APRIL 13, 2011, 10:09 A.M.

THE CLERK: Be seated, please.

THE COURT: Good morning, everyone.

ALL: Good morning, Your Honor.

MR. LANTRY: Good morning, Your Honor. Kevin Lantry on behalf of the debtors.

Your Honor, we have circulated to all the third party objectors the schedule which is largely like we proposed and presented to you yesterday. There have been a few additional changes. If I may approach with that revised schedule and a red line?

THE COURT: That'd be great.

MR. LANTRY: Your Honor, just a couple of housekeeping things. We have tried through what both of the plan proponents filed a large chart on Friday indicating what has been resolved and what has not been resolved, as well as, notices that went out to all the third party objectors either by email or fax or overnight on Friday as well. We think we have identified everyone who's been resolved so that they don't need to be here. There's always the chance that something fell through the cracks.

So what we would suggest having distributed this list is if someone is here for something that has been they think resolved or otherwise that isn't on this list, that they try to see the applicable plan proponents during the

first break and talk about it. I think that's easier than anything else interrupting.

THE COURT: All right, I think that's fine.

MR. LANTRY: In addition, Your Honor, we have found as of last night in terms of the changes that are on this list that the Department of Labor's objection to the noteholders' plan has been resolved so we move that forward since it was an objection to both plans. So that's one of the changes you see there.

In addition, Your Honor, the PHONES priority and amount, the parties raising that issue, it is pertinent to both plans, it's not really objection to both plans. We have been hearing from Wilmington Trust that he believes from chatting with him it may be a very quick administrative matter. So we might be able to take care of that early. I don't know if it really is, but they have at least asked to go to the front of the line. I'm not sure we want to grant that because if everyone wanted to go the front of the line to get out of here, but I promised that I would at least raise that with you before we started with the agenda. Right now it's put toward the end of the day.

THE COURT: Well, I'm curious about how it could be characterized as a quick administrative matter. And if someone wants to speak to that briefly, I will hear it.

MR. YURKEWICZ: Good morning, Your Honor.

Michael Yurkewicz with Klehr, Harrison, Harvey, Branzburg & Ellers on behalf of Suttonbrook Capital Management. With me today is Mr. Larry Gelber of Schulte Roth & Zabel. He has been admitted pro hoc in this case. I ask that he be heard on this matter.

THE COURT: Okay.

MR. GELBER: Good morning, Your Honor. Lawrence Gelber of Schulte, Roth & Zabel.

I apologize, sitting in the back I couldn't hear what the issue was that you had raised that you wanted to have addressed.

THE COURT: Well --

(Laughter)

THE COURT: Mr. Lantry indicated that there was an issue concerning the PHONES which parties wished me address ahead of that which had been proposed by the parties in the nature of a quick administrative matter and I'm curious about what that might be.

MR. GELBER: Oh, I'm sorry. This is a continuation. We had a hearing back in January on the amount on the estimation of the PHONES claims based on the motion of Wilmington Trust. We didn't know -- Your Honor entered an order at that time saying it would be taken up at the confirmation hearing or in the context of the confirmation hearing and we just didn't know how Your Honor

wanted to deal with that.

THE COURT: Were you here yesterday?

MR. GELBER: No I was not.

THE COURT: You should have been. And I answered that question. Let's go back to the agenda.

MR. GELBER: Okay. Thank you, Your Honor.

MR. LANTRY: Thank you, Your Honor, for that clarification.

I would only say one other thing in terms of this will progress today. We would ask that each of the objectors try to articulate all of their individual objections at once so that they will complete their presentation. To the extent then the various plan proponents have a response, we would generally have the DCL plan proponents' response go first and then the noteholder plan, if they have something additional to say in response to those objections. When there are multiple objectors on a peer issue, for example, as we get down into the list, objections to the creditors' trust or objections to the bar order, we thought it would be better for each of those objectors to articulate their issues in a non-duplicative way. And when that's completed, then the plan proponents get up and respond.

I think that's the most efficient way to do it, but I just thought I would put that out there as what we

have tentatively thought would be the most organized way of doing this.

THE COURT: Does anyone have contrary view?

(No audible response.)

THE COURT: I hear no response.

MR. LANTRY: In addition, Your Honor, just so you know, although of the issues have to go through your head in the end, we have divided our labors and many of us will be getting up on behalf of the plan proponents and articulating different points. Hopefully, we will have orchestrated that in advance, but I just wanted you to know that a number of us have divided the labor and so it will be articulated by a variety of different parties --

THE COURT: All right.

MR. LANTRY: -- but I think we know who that will be.

THE COURT: That's fine. I just ask that counsel remember to identify themselves for the record as they come up to address each individual objection or response.

MR. LANTRY: With that, Your Honor, the first individual objection is by Kevin Millen. I don't know if he's here in the courtroom.

THE COURT: Let me ask for the record. Mr. Millen are you present in the courtroom or on the telephone?

MR. LANTRY: Your Honor, I would ask that my

partner, Ken Kansa just briefly articulate the objection for you in his -- Mr. Millen's absence.

THE COURT: Okay.

MR. KANSA: Good morning, Your Honor. Ken Kansa of Sidley Austin on behalf of the debtors.

The first objection as Mr. Lantry noted is the objection of Kevin Millen confirmation. Your Honor, although the pleading has been styled as an objection to both the responsive statements, the disclosure, and the plan of reorganization, the objection articulates no cognizable or substantive objection to confirmation of the debtor committee lender plan. The pleading is a near verbatim reworking of the prior pleadings that have been filed by Mr. Millen in which he seeks allowance of an alleged defamation claim relating to a 1998 article that was published in the Hartford Current. Those claims were disallowed by this Court pursuant to an order entered on June 14 of last year at Docket Number 4775. There has been no appeal so that order disallowing those claims has long become final.

There was also a similar pleading filed by Mr. Millen seeking administrative relief that was disallowed by this Court on September 13 of last year on a similar basis to what we would ask the Court to deny the instant pleading for. Namely, there was not an articulation by Mr. Millen in the pleading of any basis on which the Court could grant the

relief requested. For that reason here, we ask that this confirmation objection to the extent that it's taken as such be denied, Your Honor.

THE COURT: Does anyone else wish to be heard in connection with this objection?

(No audible response.)

THE COURT: All right. This objection is overruled.

MR. KANSA: Thank you, Your Honor.

MR. LANTRY: The next objection, Your Honor is the Department of Labor and that is an objection just now to the DCL plan.

MR. GERSON: Good morning, Your Honor, Leonard Gerson. I'm appearing for the United States Department of Labor.

As Mr. Lantry stated at the beginning of this hearing, an agreement has been reached between the Department and the noteholders essentially to put off the resolution of the issue of whether the Secretary's claims are subject to 501(b) to a time after confirmation and instead treat those claims as disputed claims.

There's language that we've agreed on which in substance that we've agreed upon will be added to the confirmation order. I'd like to read it into the record, please.

THE COURT: Go ahead.

MR. GERSON: Notwithstanding anything to the contrary set forth in the noteholder plan or this confirmation order, the claim filed by the United States Department of Labor against Tribune Company (the DOL claim) shall be treated as a disputed other parent claim, which claims ultimate priority and amount shall be determined by a final order, unless otherwise agreed to by the parties at a time in the briefing schedule to be agreed upon by the parties. The disputed claim reserve provided the noteholder plan is deemed sufficient to allow for the satisfaction of all disputed claims, including the DOL claim in whatever amount it is ultimately allowed. Such reserve is deemed sufficient to rebut any claim that the appeal of any order disallowing the DOL claim is mooted as a result of the noteholder plan becoming effective.

THE COURT: Thank you.

MR. GERSON: That's the end of the language, Your Honor.

THE COURT: All right.

MR. GERSON: Now with respect to our objection to the DCL plan.

Congress gave the Secretary of Labor the role of protecting a worker the time in plan from exploitation. That fundamental goal of ERISA is being undermined by the

DCL plans' subordination of the Secretary's claim. Under the DCL plan, the Secretary's claims under ERISA will be paid nothing.

There are many reasons why a failure to provide any recovery on those claims should be denied, but the fundamental failure is the DCL plan proponents ignoring the difference between claims under ERISA and the claims of ordinary investors. 501(b) of the Bankruptcy Code as the Court is aware is directed at preventing investors from darning the cloaks of predators if their investment goes south.

In contrast, the Secretary's claims arise from violations by the Tribune and the trustee that it appointed, Great Banc, for a violation of their fiduciary duties under ERISA. If the claims were based on the Tribune's misrepresentations to the ESOP in connection with the sale of the Tribune stock to the ESOP, the Secretary understands that those claims would be property subordinated under 501(b). But ERISA interposes a fiduciary between a plan's investment decisions and those decisions. Our claim arises from the violation of the ESOP's fiduciary, its trustee, the Great Banc.

In leaning on ERISA, Courts are careful to distinguish the claims of shareholders from the claims arising from violations of ERISA. For example, in *Martin v.*

Fallon, it was a situation where basically the -- a company was despoiled by the actions of its management who also to some extent were fiduciaries and professionals who assisted them. The District Court -- the Secretary brought an action against them. The District Court found the fiduciaries and the corporate managers liable for violations of ERISA. The Circuit Court reversed in part. It ruled you had to -- even though the ERISA plan at issue in that case was an ESOP so as -- so the ESOP was damaged by the actions taken by the corporate managers because they were shareholders. So as to the extent the corporation was injured, so was the ESOP.

With respect to ERISA claims, it was necessary to distinguish what claims were being brought under ERISA and what claims the defendants were liable because of their mismanagement of the corporations which would be claims of shareholders. To the extent that the District Court's findings of liability with respect to the ERISA claims involved violations of fiduciary duties, the Circuit Court upheld the District Court's findings. To the extent the District Court's ruling found the defendants liable under ERISA for actions involving corporate mismanagement, the Circuit Court reversed. And we believe those same principles are applicable in this case.

We understand that 501(b) arguably is not limited to cases involving securities fraud, but is recognized by

the Third Circuit there are limits to the 501(b) scope. It's sometimes argued that 501(b) has remedial purpose and because it's remedial, it should be broadly construed. But ERISA also is a remedial statute. In fact, that fact is -- Congress stated that fact explicitly in *29 USC 1001*. ERISA explicitly states that its passage was critical to the wellbeing of millions of workers and their dependents. Congress also made their concern for ERISA plan participants evident of the Bankruptcy Code itself when it provided priority for failures by employers to make their contributions to ERISA plans.

So it would seem strange that on one hand Congress would provide a priority under the Bankruptcy Code for contributions to ERISA plans, but at the same time wish to subordinate other ERISA plans. That lack of congruity is also reflected in the treatment of what would be the treatment of the tax claims in this case under Section 4975. Section 4975 imposes a penalty upon breaches upon prohibited transactions under Section 406 of ERISA. But before that penalty is imposed, it gives the Department of Labor the opportunity to work out corrective measures with the violators. If the plans are made whole, there's no penalty imposed. If our ERISA claims are subordinated, then the tax claims which ordinarily would be subordinated to the claims under ERISA if there was corrective action taken, would

instead be superior to our ERISA claims. It's the Secretary's belief that that simply doesn't make any sense.

Ultimately, what the Third Circuit stated was that in order to understand the scope of ERISA and the scope of the claims it covers, one had to examine its -- ERISA's -- I'm sorry, Section 501(b) legislative history. And that history has essentially been universally recognized as arising from the article by Professors Slain and Kripke which was used by the Bankruptcy Law Commission and ultimately by Congress in enacting 501(b).

Slain and Kripke and Congress recognized there were two critical corrections that made subordination under 501(b) required. First, they didn't want to see the equity cushion provided by investors eroded by having the investor's claims becoming claims of creditors because that equity cushion was supposed to be there to protect creditors. That protection would be eliminated if those investors then could darn the cloaks of creditors. But as the Court is aware, that's not what happened in the leverage stock transaction of the Tribune. The equity cushion was virtually wiped out by the buyback of shareholder stock and instead as was evident from the examiner's report, what the creditors in the leverage buyout were relying upon was not any equity cushion that might be provided by the ESOP, but instead, the tax advantages that would be derived from the -

- having an ESOP structure for the Tribune. So subordinating the Secretary's claims to protect any equity cushion is simply not a rational in this case.

Similarly, the other major purpose of subordinating claims was belief by Congress that investors had assumed the risk of corporate insolvency rather than creditors. And thus it would be unfair to impose upon creditors that risk that investors had chosen to take. However, in this case, it is clear that the lenders knew -- were very well aware of the risks that were involved with the potential insolvency.

I mean, that's really the crux of the debate going on between the noteholder plan and the DCL plan as the extent to which those claims should be settled. In contrast, the workers were given no choice. The ESOP was imposed upon them as opposed to the 401K plan which they previously provided retirement benefits for them. So that alternative reason for providing or subordinating claims under 501(b) also is irrelevant with respect to the facts in this case.

In addition, as the Court is aware, 501(b) is directed at claims arising from the purchase and sale of securities. There was -- as everyone involved in this case knows, this -- the ESOP leverage transaction was viewed as a two step process. As part of the first step, the ESOP

purchased the Tribune's shares. The second step involved a merger of a wholly owned ESOP subsidiary and the Tribune. That Great Banc, the Tribune's trustee could have decided not to go forward with that merger independent of the purchase of stock that had been made. The ESOP transaction still would have involved some kind of loss for the ESOP because the stock they purchased obviously wasn't worth $250 million, but the value of that stock was greatly diminished by going through with the merger transaction. And of which ultimately led to the insolvency of the debtors.

So -- and the Tribune appointed Great Banc as the ESOP's trustee. Because of that appointment, it too, was -- Tribune also was a fiduciary to the ESOP. As a fiduciary, it had an obligation to disclose to the -- to Great Banc any information that was relevant to the decisions that Great Banc might make in connection with its duty as trustee. As the Court is aware from the examiner's report, offices of the Tribune failed to disclose critical information about the likely insolvency of the Tribune if Step 2 went forward. As far as the secretary is aware, that information also was not imparted to Great Banc. And under the law, the knowledge of a company's offices are inputted to the corporation.

So by failing to disclose that critical information to Great Banc and failing to take any action to

prevent Great Banc from going through with the merger, the Tribune violated its obligations under Section 404 of the -- of ERISA for acting with prudence, loyalty, and also its obligations under Section 405 of ERISA to seek to remedy any violations of a co-fiduciary that it becomes aware.

In addition to subordinating the Secretary's claims against the Tribune, the DCL plan also seeks to subordinate the Secretary's claims against the Tribune subsidiaries. They don't even attempt to argue that Section 501(b) is applicable to that subordination which it is clearly not even if 501(b) applied in this case, appropriately applied in this case to the Secretary's claims which we don't believe is the case. With respect to our claims against the subsidiary, it would only subordinate those claims to the claims of other creditors of the subsidiary, not to claims against the parent company.

501(b) also requires that if a claim is subordinated under 501(b), the subordination go no further than treating claims of common stock, claims of equity interests and the subordinated claims on par. That's not what the DCL plan does. It leaves equity interest in the subsidiaries unimpaired while it pays nothing on the Secretary's ERISA claims.

In their responsive papers, the debtors have argued that it's okay to leave the equity interests

unimpaired while paying nothing on the claims against -- the Secretary's claims against the subsidiaries because those would be "extra costs that would be incurred unnecessarily." But the fact that additional costs might be incurred is no basis to override Congress' explicit direction in 501(b) that subordinated claims and claims of equity holders be treated on par.

The case that the DCL proponents rely upon *Ian Media* involved an objector who is described by the Court as simply an obstructionist and not even a party of interest, a characterization that certainly can't be applied to the Secretary's claims. More importantly, the Court in *Ian Media* also stated that to the extent that any value was being allocated to the equity interests as a result of causing them -- leaving them unimpaired, that that was appropriate under the gift doctrine. As the Court is aware, the gift doctrine allows secured creditors to if they choose, to give some of the distributions they would otherwise be entitled to lower priority creditors essentially in order to get a plan confirmed.

THE COURT: Maybe not in the Second Circuit anymore.

MR. GERSON: I haven't read that case, Your Honor.

THE COURT: We'll see how it falls out.

MR. GERSON: But what's critical in this case is that the senior lenders are giving some of the distributions that otherwise might be entitled to not -- their allocating it to other classes not as a gift, but in order to get some real relief. They're getting a release. That's what the DCL plan is all about. So the gift doctrine is inapplicable to this case.

It's -- the fact that value is being allocated is also reflected in the fact that with respect to the non-guarantor subsidiary debtors, there are cash payments being made by the senior lenders to those non-debtors. If there was no value being allocated, there would be no reason to pay -- make any payments to those non-guarantor debtors.

In addition, the definition of securities litigation claims in the debtors -- in the DCL plan is not limited to claims subordinated under 501(b), but it includes -- the definition includes any claims under ERISA. That's not a legal basis for subordinating a claim under the Bankruptcy Code. I don't know if the DCL proponents have any basis to subordinate any claims other than Section 501(b), but they haven't stated that. And the definition of securities litigation claims needs to be amended to reflect the fact that it's limited to claims under Section 501(b) which the Secretary understands is the issue before the Court, but not simply claims under ERISA. And the

definition has additional breath that, you know, is not particularly decipherable.

The Secretary objected to the exculpation provision in the DCL plan. The DCL plan proponents have modified the exculpation provision to limit it to post-petition actions rather than encompassing the pre-petition actions as their initial plan provided. But there are significant defects that remain.

First, the exculpation provision covers not only officers of the -- not only covers people involved in the formulation of the plan, the debtors and their professionals, or the committee and its professionals, it covers related persons whose broad definition includes present or former employees, and similarly broad scope including people not in -- I know of no ruling that allows the definition of, you know, of an exculpation provision to include non-debtor parties to that extent who haven't been involved in the formulation of the plan.

And that's a second significant problem with the exculpation provision. It's not limited to actions taken in the formulating of a plan, it extends to all post-petition operations of the debtors. That's not the appropriate scope of an exculpation provision. Exculpation provisions are supposed to protect individuals involved in the formulation of Chapter 11 plans so they don't have to worry about being

sued sometime later. And so they can have -- they're free to exercise their judgment to the best extent possible.

Another essential objection we had to the exculpation provision was that it violates ERISA because it eliminates -- it would free from liability actions for negligence or any other claims that didn't arise from either gross negligence or willful misconduct. I guess the major support for the exculpation provision in the DCL plan was the Third Circuit's *PWS* opinion. But in *PWS*, that was before 2005 when the Bankruptcy Code was enacted -- I'm sorry, was amended.

THE COURT: I knew what you meant.

MR. GERSON: Thank you, Your Honor.

THE COURT: I was there at enactment, I remember. (Laughter)

MR. GERSON: To specifically provide that Chapter 11 debtors, trustees, would they have the obligation for administering ERISA plans. The opinion in *PWS* was premised on the fact that the freedom of liability -- the limitations in liability it was providing was no greater than what was ordinarily provided to creditor's committees under 1103. But it didn't have the opportunity to consider the effect of ERISA with respect to that exculpation provision because that then was not an obligation of the debtors and Chapter 7 trustees.

THE COURT: Well let me ask you this. How would you describe the interplay between ERISA and the Bankruptcy Code? Is there merely tension? Is there conflict? Is there ambiguity in the Bankruptcy Code's language? How would you articulate that dynamic?

MR. GERSON: Generally or just with respect to the Secretary's claims in this case?

THE COURT: I would say the latter.

(Laughter)

MR. GERSON: Well I think by requiring a Court to look to the legislative history in order to determine the scope of 501(b), it -- there's -- you know, there's a recognition that the language in 501(b) is not crystal clear, but --

THE COURT: Well, typically, Courts look to legislative history when they determine -- well they do it in two instances. One, when they determine the language of the statute may not be clear. And/or to support a view that they've reached that the language is clear and here's why. So despite admonitions that Courts in cases in which the statute is clear shouldn't delve too deeply into legislative history, it seems they do so anyway.

MR. GERSON: That's -- I think that's a correct observation, Your Honor. I guess the problem that the tension that arises, the difficulty is a difficulty that

arises in frequently in non-bankruptcy situations where a Court is -- where there's an overlapping of facts and the Court's are required to distinguish well, what's a violation of ERISA. And what's the violation of the shareholder's rights? And when the shareholders are -- is an ERISA plan, the -- you know, the analysis can sometimes get complicated.

So and that's why -- but I think there's a clear way of looking at it by determining well what actions were corporate actions to which the ESOP might have suffered because there were shareholders and what did they suffer? What -- because of violations of ESOP fiduciaries which include the Tribune. But in this case, I don't think when the claims get -- if, in fact, we get over the hurdle of the plan and we analyze the claims, they become disputed claims, then the Court will be in a position where it's going to have to make that distinction as to what was a claim for fiduciary breach and what was simply a claim for corporate mismanagement that the ESOP suffered. But the blanket provision in the DCL plan which simply subordinates all ERISA claims to 501(b), doesn't provide -- doesn't allow for the necessary analysis.

THE COURT: All right, Mr. Gerson, you need to wrap up.

MR. GERSON: That's a wrap, Your Honor, thank you.

THE COURT: All right, thank you.

MR. KRAKAUER: Good morning, Your Honor. Bryan Krakauer on behalf of the debtors. I'll be addressing the objection to the -- of the Department of Labor.

Let me start out by saying the issues raised by the DOL are pertinent to both the DCL plan and the noteholder plan. Although the objection to the noteholder plan has now been resolved, they've resolved it by pushing the issue of subordination to a later date if the noteholder plan is confirmed, but it's still very much an issue in both plans as to the proper treatment of the DCL claim. The DCL has asserted unliquidated claims against both the Tribune parent and the subsidiaries. And although the claims are unliquidated in their face, they indicate in discussions that they may assert very large claims of potentially hundreds of millions of dollars.

All these claims arise by their own admission from the Tribune's ESOP and what they assert are purported violations of ERISA. The claims themselves if it was ever got to the merits are very much disputed, but today is not the time to talk about that. The issue is in our plan is even if they were determined to be allowed claims, whether they're properly subordinated under 501.

Both plans classify ERISA claims relating to the ESOP as securities claims which are subordinated pursuant to

501(b). The DCL plan defines securities litigation claims and then provides that securities litigation claims are extinguished are -- because they're subordinated, there was nothing there for them and, therefore, they're extinguished. The noteholder plan also contains a definition of subordinated securities claims which defines to include ERISA claims. And provides that if a claim is found to be a subordinated securities claim, that it does receive nothing. The one difference is the DCL plan specifically refers to the Department of Labor claim, whereas the noteholder plan just refers to claims based on ERISA.

The DCL plan does provide that the claims are extinguished. The purpose is so that the debtor can emerge without the overhang of this claim. Pursuant to the DCL plan, claims at the parent are paid north of 30 cents on the dollar and claims against the subs are essentially paid in full. So having a large unliquidated claim that's still to be litigated is a significant overhang.

And as far as what the Department of Labor claims consist of, they all arise from the Tribune common stock acquired by the ESOP in the leverage ESOP transaction. The Tribune stock is the only asset of the ESOP. The ESOP acquired the stock by issuing a non-recourse note to Tribune which was payable through yearly contributions by Tribune to the ESOP which are applied against the note balance. The

DOL asserts that the ESOP's acquisition of that stock violated ERISA. The DCL also asserts that various other actions or inactions including as they've said the consummation of Step 2 of the leverage ESOP transaction reduced the value of that ESOP stock and also violated ERISA.

But the common nexus for the DOL claims are they're all based upon the stock, the Tribune stock. They're all based upon either the acquisition of that stock or on losses relating to that stock. And essentially what the DOL is trying to do is assert a claim to recover for losses related to that stock or claims based on the acquisition of that stock.

501(b) provides for the subordination of claims among other things, arising from the purchase or sale of the security of the debtor. The debtor here, the Tribune or an affiliate of the debtor. So it would apply to claims against the subs because the Tribune is an affiliate of those debtors as well. And the remedy under 501(b) is that such claims shall be treated as subordinated. And in the case of common stock like we have here, they're at the same priority as the common stock of Tribune. So they're treated as at the end of the priority chain. And there's nothing here for common stock of the Tribune in this plan.

The Third Circuit's decision in *Telegroup* is the

leading decision quite obviously in this circuit. And it rejected the theory advocated by the DOL here that 501(b) is narrowly limited to claims arising solely from securities laws or other illegality in connection with the stocks issuance and not anything after issuance. The Third Circuit found that the claims subject to 501(b) extend to claims which have a nexus with a debtors' common stock that arise either connection with the acquisition of the stock or which afterwards arise in connection with actions or inactions after the acquisition of the stock. And particularly, the Court noted that 501(b) subordinates claims due to a decline in the value of that stock that occurs after acquisition. And the nexus test under 501(b) according to *Telegroup* is whether the claims would exist but for the claimant's purchase of the stock. The claimant here being the ESOP.

The view that 501 must be applied broadly to claims based on asserted debtor wrong which resulted in a -- any claims based on asserted debtor wrong which is based -- resulted in diminution, excuse me, diminished equity value is not also limited at the Third Circuit. It's been followed consistently by every Court of Appeals that's looked at this issue. The Second Circuit in *Med Diversified* has a case. The Fifth Circuit in *Seaquist* has a case. The Tenth Circuit in *Geneva Steel* has a case. And the Ninth Circuit has addressed the issue and come to the same

conclusion in *Beta Comp.*

There is no Court of Appeals which has agreed with the DOL in terms of the limitation that they're arguing for under 501. And the *Telegroup* standard is clearly satisfied here. All of the claims relate to the ESOP Tribune stock acquisition and actions after that acquisition that had some effect on the stock. That's what is at issue in connection with the DOL claims.

The DOL's argument that ERISA claims are different and are not subject to subordination under 501 is simply wrong. There is no case out there that has held or even suggested that. *Telegroup* --

THE COURT: Is there any case out there that subordinated a government claim?

MR. KRAKAUER: Yes. There's a case called *Lantico* which is at cited in our brief at *116BR 141 Eastern District of Missouri.* Specifically, the DOL was a party to that case. It came in and asserted an ERISA claim based on a violation, an ERISA violation of an ESOP and the Court found that its claim was subordinated. It's directly on point.

You also have in addition to the general finding of *Telegroup*, you have cases like *Enron* which dealt with KERP's and 401k's and found that those claims were all subordinated, as well as, stock options for employees. You

have *Med Diversified* which found with respect to employee compensation agreement claims which is essentially what we're also talking about here that those were subordinated.

THE COURT: In a decision that I rendered in *Touch America*, I discussed both *Telegroup* and *Enron.* Is there anything in my decision that would weigh against the debtors' position here?

MR. KRAKAUER: I haven't found anything in your decision which weighs against our position. I found there are certainly things in your decision which are directly pertinent, I believe, and weigh against the DOL position. Among other things, in *Touch America*, you found that 501 is not limited by who is holding the claim. And the issue there, if you recall, was the claimant's argued that 501 was limited to shareholders asserting claims. And that was also a -- these were claims that were asserted for indemnification and contribution. And they were based on ERISA violations in connection with an ESOP. And the D's and O's came in said we're not shareholders, we're not covered by 501.

And this Court looked at *Telegroup* and the principles of *Telegroup*. I remember you looked *Enron* as well and said that's not the way the statute is intended. That's not what other Courts have found. And that, indeed, you looked to the nature of the claim whether it arises from

stock and in essence whether it's an attempt to recover for lost value of the stock or for some impropriety based on the acquisition of the stock. And if it is, then it's covered by 501. That's what you indicated was the proper result in *Touch America* and I think it's exactly right. It's consistent with all the other cases out there.

Your Honor, the point about subsidiaries I also want to address is that subordination and extinguishment of the claims against the subsidiaries in this case is also absolutely required. Mr. Gerson from the DOL was wrong when he said that we don't -- haven't argued that 501(b) is applicable. 501(b) is applicable. And as I recited at the beginning of this argument, 501(b) applies to claims based on the stock of an affiliate. And here any claims that the DOL has against subsidiaries apart from the other reasons why we would dispute them, we would say even if they had claims, they're based again on ESOP's dealings, ESOP's acquisition and ownership of the Tribune stock and that's the stock of an affiliate.

And what 501(b) then says is if you have a claim based on that security and the damages associated with that security, then that claim is subordinated to the same level as such security here, the common stock of the parent. So under 501, you have a very straightforward reading the test, of the text of the statute which says that those claims are

simply subordinated to the same level as common stock of the parent company.

The one case they cite and I'll -- I'm going to probably butcher the name, but Lesby and Hauck [ph] -- let me look it up, L&H.

MR. GERSON: Lerner and Hasbith [ph].

MR. KRAKAUER: Lerner and Hasbith, thank you. Which dealt with an issue of claims against a subsidiary and whether they were, in fact, subordinated to those -- the parent claims. It was very different. There the party had independent dealings with the subsidiary. Alleged that the subsidiary independent of any issue related to the stock or damage to the stock had damaged it. And the Court simply found that those independent claims didn't follow the stock. That's not the situation here. Here, the whole nexus is what the ESOP did at the parent and what happened with the stock. So that does not apply.

Second, the issue, the next issue is how do you treat -- even if you didn't have 501(b) which is dispositive is there any issue with respect to keeping the equity of the subs owned by the parent in this situation? Does that somehow violate some absolute priority rule? And the case law is that it does not. *Ian Media* which is a case we cited is right on point. It doesn't depend upon the gifting argument. There is a footnote where Judge Pack in *Ian Media*

says by the way, I could if I wanted also to justify this on gifted. And as you point out with the recent Second Circuit ruling, at least in the Second Circuit that's more of an issue, but that's not the basis of his holding. That was just an alternative saying that he could find that on that basis as well.

The basis of his holding as he says you look at whether or not you have a creditor who is recovering something additional by virtue of keeping the equity in place. And if you're using the stock of the subs to provide something to a creditor that is violative of the absolute priority rule, that's one thing. But if you're keeping the stock in place because your purpose is that it reduces cost, it avoids the unnecessary cost and hassle frankly of reorganizing and starting with all new entities and doing a mirror structure with, you know, spending all the lawyer time and I think we've had enough lawyer time in this case trying to recreate the debtor subsidiary structure and you're doing it as a matter of convenience to keep an existing structure in place because it's an efficient one, that is perfectly fine and that not a violative of the absolute priority rule.

And here, that's all that's happening. You have merely a situation where the administrative structure of the various entities is being kept in place because it's an

efficient structure. It's not to provide additional value to any other -- to any peer core party. It's just to keep these entities in place rather than going to the cost of creating new ones and mirroring it. What you could do is just be very -- is just an additional cost and expense to do it. So when you look to the purpose of it, *Ian Media* makes clear that that -- you are not violating the absolute priority rule.

And then finally, this can also be justified based on simply new value. I mean, there is money coming out of the Tribune parent that's going off that's going to pay for claims against subsidiaries. There's also value coming from the senior lenders that's going to creditors of the subsidiaries and that's all new value and it's perfectly standard and appropriate. It doesn't have anything to do with gifting to provide that in return for that new value given, that the stock is kept by the parent.

So I don't believe there's any issue with regard on three different points with regard to keeping those equity interests in place. And it's not violative of anything and it's perfectly appropriate to subordinate the claims against the subs as well.

Then I should I also point out that 501(b) is not a discretionary statute. If it applies, then the subordination is mandatory. And there's a number of cases

that said that. There's one that came out as recently as January 19 of this year called *Deep Marine* which is a decision by the Bankruptcy Court in Texas and it says exactly that, if 501(b) applies, it has to be applied.

So in sum, this is a clear case under a whole range of rulings that these claims must be subordinated and they're -- and they are entitled to subordination under 501(b). And there's really no case law out there to the contrary. All the cases are consistent. All the Circuit Courts including the Third Circuit have viewed 501(b) very expansively. And when you get to what all those cases say in terms of its purpose is this a situation where somebody is trying to in essence get a recovery on account of the diminished value of stock? That is what this is about and there's no real dispute about that and 501(b) applies and subordination is appropriate.

Then the final point is with regard to exculpation. The provision as Mr. Gerson has pointed out, we did make clear as was originally intended, but we now make absolutely clear, it's only intended to apply to post-petition conduct. The provision with regard to estate fiduciaries which is what the DOL is looking at in terms of officers and employees of the debtor which is where they're focused on is consistent with what we've done. Is consistent with what the Court found appropriate in *PWS*.

That's what we based on this provision on.

And Mr. Gerson is incorrect in saying that *PWS* only dealt with the proposal -- proposing a plan. The language in -- that was approved in *PWS* said it was appropriate to have an exculpation that was relating to and arising out of the Chapter 11 cases. For basically all conduct relating to and arising out of the Chapter 11 cases by estate fiduciaries. And that's what the provision we have here does provide.

Now Mr. Gerson had said that he believes that ERISA provides -- it's a different standard in that it is not legally appropriate or not legally allowed to change that standard in this exculpation. We disagree with that, but what we've done with the exculpation is provide that it applies only to the extent legally permissible. So to the extent that there is an argument is that it is simply unlawful to change the ERISA standard and the exculpation can't do that as a matter of law, that's -- the argument's still there because we're -- we've made the exculpation subject to it being legally permissible. So the Court does not have to find that issue today.

Your Honor, I think I've tried to keep this short and to the point just to summarize what our view is. But this is an important issue for allowing the debtor under whatever plan to emerge unencumbered by this claim. It

could be a very substantial claim if it's not subordinated and it's very important so I wanted to make sure you addressed it.

THE COURT: All right, thank you.

MR. KRAKAUER: Thank you.

THE COURT: Mr. Gerson, keep your seat. And the reason is that I think if we go to rebuttal on these objections, we will just never get done.

MR. DUBLIN: Your Honor, if I may just for one minute. Phil Dublin, Akin Gump for Aurelius and the other noteholder plan proponents.

I'd just like to correct something that Mr. Krakauer said on the record just so that everybody is clear. He made the statement that the noteholder plan like the DCL plan, does not provide for any recovery to subordinated creditors. The way our plan operates is that we have trust interests for creditors that are entitled to receive an initial distribution like subordinated creditors who have to turn over anything they would receive or are just not entitled to receive anything until senior creditors are paid in full. So based on the success of the LBO related causes of action, we would expect that subordinated creditors may actually receive a recovery in our cases. I also question whether based on the modifications that have been made to the debtor, committee, lender plan where the now

have -- are not releasing the intentional fraud claims or any claims against the Step 1 shareholders other than certain small dollar denomination ones, whether now you may actually come in in their litigation trust causes of action that would likewise be able to flow to subordinated creditors. Thank you, Your Honor.

MR. JOHNSTON: Your Honor, Jim Johnston of Dewey & LeBoeuf on behalf of Oaktree and Angelo Gordon.

I just wanted to make one observation based on something that we heard for the first time this morning. So I wasn't able to convey my comments to Mr. Krakauer. And it relates to the apparent resolution of the DOL objections to the noteholder plan. As I understood what was read into the record, those objections are resolved by essentially agreeing to kick down the road the dispute over subordination of the DOL claim against Tribune Company with the implication being that all of the claims of the DOL against the subsidiaries go away. I wanted to point out that that essentially drives home one of the points that we make which is that there is no their, their with respect to DOL claims against the subsidiaries. To the extent that there's any claim whatsoever that the DOL asserts, it is subordinated. But more importantly, it's a claim against Tribune, the entity with the ESOP. The entity whose stock is at issue. And I think by agreeing to get rid

of the claims against the subsidiaries in the context of the noteholder plan, it really affirms the point that there is no legitimate claim by the DOL against the Tribune subsidiaries. Thank you.

THE COURT: Thank you. All right. Shall we turn to Great Banc?

MR. GERSON: Your Honor, may I be heard one minute?

THE COURT: I'll tell you what, Mr. Gerson, let's do this. Let me -- and I --

MR. GERSON: Literally one minute.

THE COURT: I may regret this later, but what I may do is permit the objectors to make post hearing submissions, okay? And I'll deal with that at the end of the day today. But I really -- I want to be able to get through these things today.

MR. GERSON: Thank you.

THE COURT: Okay.

MR. RICH: Good morning, Your Honor. My name is Jeffrey Rich. I'm from the firm of K&L Gates and we represent Great Banc as trustee of the ESOP.

Your Honor, I'll try and be brief. You've heard -- as you know that the plan provides that securities litigation claims will be extinguished, not subordinated. That is the words of the plan that the DCL proponents have

put forth.

Without conceding whether or not Great Banc has a securities litigation claim because obviously that is something for another day, Great Banc's objection essentially is that if it is a 501(b) claim by virtue of the statute it has to be subordinated, not extinguished. It may be economically the case that it is remote or extremely remote or maybe even impossible that there will ever be a distribution to subordinated creditors under the DCL plan, but that is not a fact as of today. And 501(b) does not say these claims are extinguished, it says these claims are subordinated. So all that Great Banc is asking is that that section of the plan be revised to say that instead of these claims being extinguished, they are subordinated. And then that really is the argument, Your Honor.

THE COURT: Thank you.

MR. KRAKAUER: Your Honor, again, Bryan Krakauer for the debtors. I'll make this brief.

First, I do apologize to Mr. Dublin. He's correct about what their plan provides.

Here, the subordination under the code is to the same level as common stock. There's been -- there has been a lot of testimony in this case about -- presented about what values are and what values of the claims are. And in terms of common stock, what its provided is the common stock

is simply extinguished because there's been no showing that there's any value associated with common stock. If Great Banc wanted to come in and show that there was, in fact, value there, they had an opportunity during the evidence phase of this case to do that. They didn't do that. There's no showing that there's value there. And why common stock? We've simply provided that those are going to be extinguished.

THE COURT: Sir, is there any confirmed plan that supports your view?

MR. KRAKAUER: Any confirmed plan? It's pretty common in confirmed plans to provide that common stock gets extinguished when there's no value.

THE COURT: No, I'm talking about specifically with respect to the one remaining objection Great Banc has and that is that it should say subordinated, but not extinguished. It seems to me as a matter of plain statutory reading that that's a fair objection.

MR. KRAKAUER: With respect --

THE COURT: And, you know, Great Banc acknowledges --

MR. KRAKAUER: Yeah.

THE COURT: -- as a matter of economics, it may end up being the same thing, but we now don't know that really. And, in fact, if what you're suggesting and I think

it is that in every case in which a class is proposed to be subordinated, they've got the burden to come in and give valuation testimony, I will you tell you, I decline respectfully to burden myself with that exercise --

(Laughter)

THE COURT: -- and anyone else who might be involved.

MR. KRAKAUER: Your Honor, it is the case in most reorganizations and this is reorganization, that where you provide for -- when you try -- you provide for who's going to get what in terms of the various classes of consideration, right? And here, we've done that.

With respect to the Tribune itself, it's emerging and it's determining what various classes are going to get. And if somebody comes in and says that they are entitled to something, there has to be some evidence in there that there's some value there and there just -- it just isn't here. I do understand your point with regard to the litigation trust which is I think what you're saying which is under our plan. And, you know, that's where end up.

THE COURT: Okay. The objection is sustained.

MR. KRAKAUER: Okay, thanks.

MR. DUBLIN: Thank you, Your Honor.

MR. KANSA: Your Honor, this progresses us to the next section where we have objections to both plans. I

don't know if you want to break now or progress with the Zell EGI objections?

THE COURT: All right. We'll take a ten minute break.

(Recess from 11:23 a.m. to 11:35 a.m.)

THE CLERK: All rise. Be seated, please.

THE COURT: Let's press on.

MR. BRADFORD: Good morning, Your Honor. David Bradford, Jenner & Block on behalf of Mr. Zell and EGI-TRB.

Your Honor, we occupy the next several topics on the agenda. I'm going to address first our objections as to the pursuit of claims against Mr. Zell not being fair and equitable to creditors and why it is a waste of their assets to pursue frivolous claims. I'm also going to address why if those claims are permitted as part of either plan, the exculpation provisions of those plans should be stricken or modified and the restrictions on indemnification for legal fees for existing directors and officers should also be eliminated. And finally, why if those plans are permitted to go forward with claims against Mr. Zell, Aurelius, and the PHONES have conflicts of interest which preclude from acting as litigation trustees with respect to those specific claims.

We also have objections that relate for example

in Item B1A to the priority of EGI's claims, an objection to the bridge settlement, and objections that I think come later in the agenda under the topics of creditor trust related to the 346(e) priority issue in the bar order.

It's our understanding that those objections will be addressed later because they're part of a group of objections where others will also be appearing, but that I together with my partner, Cathy Steege who will address the issue of priority of EGI's claims, will address everything that is in Items B1 and B2A at this time and then we'll move further down the agenda if that's agreeable to the Court.

THE COURT: That's fine, I just have on request. You mentioned at the beginning of your statement that you wanted to address why claims, alleged claims don't have any merit. I would say spend no time on that. And by saying that, I don't tell you that I think they have merit, I know we have a hearing scheduled at some time in the future on the standing issue, but that's not an issue for now as far as I'm concerned.

MR. BRADFORD: If I might just be heard briefly on why we believe it's an issue for now Your Honor.

THE COURT: Certainly.

MR. BRADFORD: With respect to the -- both plans, each of them effectively seek to finance and fund their plans on the basis of claims that are being asserted. The

claims against Mr. Zell which are the subject of -- there is no pending standing motion I should say. We do have a motion that's coming up in the future where we have attempted to serve a Rule 11 motion and that's been objected to on the grounds that the stay precludes even the service of a Rule 11 motion. But independent of our effort to at least effectuate service of a Rule 11 motion, we have nothing on the horizon that is going to address that claim.

Your Honor may recall that the issue as it pertained to standing was addressed by the committee withdrawing its request for confirmation of standing. So they withdrew that motion entirely. We think that's indicative of their desire to avoid a resolution of whether these claims are in the best interest of the estate, whether they're colorable, and whether they survive Rule 11. And that those issues need to be addressed at some point and that ultimately they go to whether or not it's in the best interest of creditors, including EGI-TRB which is a substantial creditor to spend estate money, deplete the estate insurance policies on claims that the examiner not only found lacked merit, found highly unlikely to succeed in critical part, but that as Your Honor heard, Professor Black opined had no value and no merit --

THE COURT: Okay. Mr. Bradford, stop, please stop there.

MR. BRADFORD: Sure.

THE COURT: You've come up and your colleague has come up repeatedly to tell me the same thing. I do not need to hear it again. I know what your position is, believe me. I was unaware and maybe it could be that in the course I was asked to sign an order and just don't remember it, that that issue had gone away in terms of standing. So that's my miss, not yours. But I don't want to get into the merits again. Mr. Sottile?

MR. SOTTILE: Your Honor, I rise only because the issue with respect to standing has not gone away as I understand it. As the Court will recall, the Court granted standing to the committee to pursue claims against Mr. Zell and EGI-TRB back in October. When the committee filed an amended complaint as the Court will recall, the committee also filed a motion to confirm that the claims asserted and the amended complaint fell within the scope of the original order.

THE COURT: Yeah, and I thought that was unresolved.

MR. SOTTILE: It was resolved without objection as to all parties other than those represented by Mr. Bradford.

THE COURT: No, that I remember.

MR. SOTTILE: And then ultimately, in part in

response to the Court's suggestion when -- after the motion and confirmed standing was filed, we withdrew the motion to confirm standing without prejudice. To be absolutely clear, it's the committee's view that the Court has already granted standing as to these claims.

THE COURT: Okay.

MR. SOTTILE: And that the motion to confirmation standing was unnecessary. The Court should not take the withdraw as anything more than taking something off the table we did not believe was necessary.

THE COURT: No, I was just thinking that I had -- I remember saying that I was not going to consider the issue before confirmation. And I think we had set a hearing date at some point in the future, I just didn't remember when that was, but thanks for bringing me up to date.

MR. SOTTILE: Thank you, Your Honor.

THE COURT: Okay.

MR. BRADFORD: Yes, Your Honor, just to complete the record on that. When we filed our plan objections, that motion was scheduled for hearing and we incorporated that motion into our plan objection. So it was our understanding that this issue would be taken up at confirmation. We understood our objection to confirmation would be the vehicle for doing that. We're happy to --

THE COURT: I'm not overruling any part of your

objection at this point and I'm not suggesting that you need or should have abandoned it. All I'm saying is I don't need to hear oral arguments on it.

MR. BRADFORD: I understand, Your Honor.

THE COURT: So that you're clear. Okay.

MR. BRADFORD: I understand. If I might, Your Honor, then I'm going to turn to specific provisions in the plan which we think provide inadequate safeguards against frivolous litigation. And I'll try to restrain my remarks insofar as they boil over to the particulars of these particular claims, but one of the key concerns we have is the exculpation clause. The exculpation clause has in it a provision that essentially as we read it would exculpate litigation trustees from liability and circumstances where they have acted in good faith in a reasonable understanding of their authority.

We note with respect to Rule 11, that Rule 11 does not turn on the subjective good faith of a professional, it's an objective standard. It turns on whether there is an objective basis for the claims. We have and the record reflects that this will before the Court at the omnibus on the 25th, moved to modify the stay or objected to the extension of the stay so that we could proceed on a Rule 11 motion.

We do think there are Rule 11 violations in

certain of the claims that have been asserted against Mr. Zell and to permit a plan to exculpate professionals from their Rule 11 liabilities is unprecedented and would not in any way further the general interests of exculpation in protecting individuals who have been involved in the formulation of a plan. The conduct of the litigation trust and the conduct of a litigation is a separate animal from the issue of the litigation of the plan itself. And certainly there is no basis to exculpate professionals to the extent that there have been Rule 11 violations or if in the future, Rule 11 violations are committed in connected with the pursuit of these claims.

As a second and related matter, we object to the provisions in the plan which effectively provide limitations on indemnifications of directors and officers with respect to the LBO claims. We have cited to the Court in our objection three cases, two recent cases from Delaware; the *Summit* case, the *Pamalum* [ph] case, and the *Crabtree* case from the Southern District of New York holding that articles of incorporation are executory contracts.

Here we have articles of incorporation which provide indemnification for the directors. And as a consequence of that under *Sharon Steel* they must either be accepted or rejected in whole. What the debtor can't do or either plan can't do is essentially pick piecemeal where

it's going to provide indemnification for legal fees and where it is not. And that's what the plan proposes to do by providing and recognizing the articles insofar as they provide indemnification rights for legal fees in all circumstances but for the LBO claims.

The debtor or DCL plan proponents I should say in response cite two cases that suggest that articles of incorporation are not executory. Neither of them dealt with Delaware articles of incorporation. The *Baldwin* case comes out of Ohio and involved a circumstance where indemnification was permissive, not mandatory as it is in Delaware and where the directors had already done their service. Mr. Zell by contrast is still currently a director. So he has been induced to continued service and does continue service in reliance upon the articles of incorporation.

Certainly, when someone has completed their service, someone may make the argument that the situation is not longer executory insofar as that director can no longer breach their contract. But as to a director who continues their services, there is an executory situation and either the contract and the bylaws in this case, articles of incorporation must be accepted in whole or rejected in whole. There is no proposal and should be none to reject them in whole.

Similarly, the one other case cited by the DCL proponents here the *THC* case is a 1977 Hawaii case where the directors had already served in the past. And the Court there specifically preserved the right to seek indemnification for legal fees as an administrative claim. So there should be no basis to limit our right to indemnification for legal fees, if these claims go forward to a claim in the context of the unsecured claim administration. There should be an ongoing right to indemnification that continues independent of the claim process.

And to the extent that litigation is being brought here and it's frivolous or unsuccessful there is no reason that a sitting director should be denied their right to both advancement and payment of legal fees to the extent not otherwise provided by insurance. And the insurers are taking positions such as there's a $25 million deductible and so forth. So there can be no reliance completely on DNO insurance. And I believe this is ultimately important as well because it goes to why the estate ultimately could be injured by the pursuit of claims because ultimately there should be indemnification costs to the estate from the continuation of that litigation.

The final point that I would turn to in terms of objections to the plans insofar as they pertain to the

pursuit of litigation and then I'll ask Ms. Steege to address the issue of priority and the bridge settlement is related to the conduct of the litigation trust. And I should note, Your Honor, that each of these objections, that is our specific objection on indemnification exculpation on the conduct of the litigation trust would be moot if, in fact, these claims could not go forward. Whether that would be for standing or Rule 11 or other reasons. And so the Court need not reach any of the issues I'm addressing today if, in fact, the claims against Mr. Zell are not permitted to go forward, they would become moot.

The history of this case illustrates precisely why neither of the parties and I would focus specifically on Aurelius or the PHONE, should be in a position of controlling any litigation trust decisions that relate to whether or not claims against Mr. Zell specifically should be allowed to be pursued.

Your Honor will recall that prior to the appointment of the examiner in this case, there was an investigation of claims. It was done first by debtor and then by the UCC starting in May of 2009 and including by the Zuckerman firm starting in August of 2009. It's been represented to the Court that there were some 30 witnesses interviewed, 4.5 million documents reviewed. And following that investigation, there was a determination that there was

no basis for claims against Mr. Zell as reflected by the fact that a plan was put forward to this Court that was accepted by the creditors' committee, accepted by Centerbridge, accepted by JP Morgan, Angelo Gordon, and Law Debenture to had a release for Mr. Zell. And your heard Mr. Gropper testify, he had no objection to that plan at that time.

So what happened? And what happened, I believe demonstrates why typical safeguards against frivolous litigation are not sufficient here and why the individuals who have now elected to include claims against Mr. Zell have incentives to do so which are unrelated to the best interest of creditors and should disqualify them from continuing to serve in that capacity going forward. And that is as Your Honor knows and I won't get into the merits.

The examiner came in and among other things, the examiner vindicates Mr. Zell. At the same time, what that does is change the dynamics of this bankruptcy. Two things happen. Aurelius buys the PHONES position. And Aurelius decides that it now has a plan that is going to generally pursue litigation and it wants to be in a position to attach any settlement plan put forward by the DCL proponents.

And as a consequence of its acquisition of the PHONES position, Aurelius gains an interest in trying to subordinate the EGI-TRB notes. That's a direct economic

interest that they have. Ms. Steege will address the issue of subordination between those two. But suddenly, Aurelius has an interest in saying well Mr. Zell must have done something wrong because that would provide us a basis for subordinating a competing creditor who is otherwise ahead of us in the food chain here. And that coupled with the fact, they seize on the fact that Mr. Zell's long time advisor, Mr. Liebentritt whose integrity I would say could not be challenged by anybody in this courtroom is the general counsel in Tribune and he becomes the chief restructuring officer of Tribune. And so isn't a convenient that if we can tar Mr. Zell as the architect of some great LBO conspiracy, we can claim that everybody on the other side of the courtroom has a conflict of interest.

And you continue to hear that song played, Your Honor. And the fundamental fault with that whole argument obviously is that there is no viable claim here. Anybody independently who looks at it has seen there is no viable claim. But Aurelius has demonstrated that for reasons related solely to the rhetoric and desire to promote its own plan and advance the economic interest of the PHONES position that it purchased, it has an incentive to try to put Mr. Zell into the role of an LBO defendant when there is no basis to do that. They cannot make an objective disinterested determination about whether that's in the best

interest of creditors.

THE COURT: Let me ask you to pause for a moment.

MR. BRADFORD: Sure.

THE COURT: Yes, Mr. Golden?

MR. GOLDEN: Excuse me, I'm sorry. Your Honor, I tried to patient here. I don't like to be interrupt when I'm making a speech. I thought it was very clear based upon a lot of communications with the Court that today was reserved for legal objections to be raised by third parties not including legal objections by the DCL's or the noteholder plan proponents. It is equally clear listening to Mr. Bradford that he is not relying on solely legal objections. He is I'm not sure what the evidentiary record that he's tried to establish is based upon. I don't believe it's the testimony that we've heard over the last twelve trial days, but these are not based on legal objections.

And so I don't have to keep getting up and sitting down to make this objection, I was wondering if we could get some clarification from the Court as to whether we are -- whether all the parties today are confined to making legal based objections or are we now expanding that into some kind of evidentiary basis upon which I don't know what the basis is.

THE COURT: Well, as I understand it, Mr. Bradford is arguing that a litigation trust controlled by

Aurelius and I understand what the dynamics are there between the advisory board and the trustee and we did get into that this week, I think. But arguing that you're legally ineligible to be an estate fiduciary. I mean, that's the essence of it. So I don't know how else -- Mr. Bradford, if I'm wrong correct me.

MR. BRADFORD: That's correct, Your Honor.

THE COURT: Okay. I -- so I'll allow you to continue.

MR. BRADFORD: Thank you, Your Honor.

THE COURT: But again, as a general proposition, Mr. Golden is right. We're here today to talk about objections which are based on the law, not tied to an evidentiary record.

MR. BRADFORD: And so the record we believe reflects and this I don't believe gets into evidence, but the proceedings before this Court even prior to the start of the confirmation hearing when Your Honor will recall that what Aurelius proposed to say in its disclosure statement about its plan and I quoted this to the Court previously, I'll quote it again. Aurelius claimed shortly after the examiner report vindicating Mr. Zell, "The examiner's report put an end to 20 months of cover up. It exposed flagrant wrongdoing within Tribune's executive ranks and identified billions of dollars of LBO related actions, many of them

against Tribune insiders such as Sam Zell who's close business associate is Tribune's chief restructuring officer that would have been released for free under the prior plan." And clearly, that was a false statement as it was put forward. And Your Honor required that they excise that from the disclosure statement.

But the theme persists which is we have to tar Mr. Zell as a wrongdoer and bring claims against him notwithstanding that every independent party who has looked at this has said there is no basis for doing so, so that we can contend that there's a conflict of interest on the other side of the courtroom.

And then you've heard it throughout this case, well you happen to know Mr. Zell, that must make you ineligible to act in good faith. And I know Your Honor has seen through many of those aspersions and attacks on people's good faith and these purported conflicts of interest, but this is a vestige and surely Aurelius in the role that it's in with an ownership interest in the PHONES with a very clearly announced position that this relationship of anybody to Mr. Zell disqualifies them from being independent in this case because of their claims against Mr. Zell give them incentives that are different than looking out for the best interest of creditors and should disqualify them from acting in a role of litigation

trustees.

THE COURT: Well some might argue that's exactly the kind of party you should have chasing such claims for the very reasons that you described.

MR. BRADFORD: If, in fact, there motives were not restricted to getting the PHONES put ahead of for example EGI-TRB, but there are a whole host of other creditors ahead of them. There are a whole host of parties who depend upon the distributions from this plan. And there is nobody before this Court who has other than obviously the examiner who had no interest in proposing a plan, there's nobody before the Court who has the best interest of the all the creditors in mind. And if you look at why are we not hearing from the DCL proponents that it makes no sense to pursue this litigation, I think you've heard them through their own expert say they don't believe this litigation has value. They don't believe this litigation has merit, but they don't want to be accused of being soft on Mr. Zell because they're being accused of having this conflict. They're put in the position of responding by saying well, we'll sue him, too. Let's have a party and see who can find more claims to assert against Mr. Zell so we don't have a conflict of interest either.

And you, therefore, have this incentive on the part of Aurelius to triumph the PHONES position over EGI-TRB

and to construct a conflict when none exists as a motivation for bringing claims that otherwise don't meet the best interest test, don't meet the Rule 11 test, and you have DCL proponents who are put in the defensive and say we'll do whatever Aurelius will do by way of suing people so nobody can accuse of being soft on the LBO claims.

There is nobody who has been an independent decision maker and that's all we're asking for is an independent trustee without those kind of specific creditor oriented incentives, incentives that are unique to particular creditor positions instead of in the best interest of all creditors. And we would submit Professor Black who was the proponent for the DCL or the expert for the DCL proponents on the value of the claims, spoke for them when he testified that there was no value to these claims and that these claims did not have merit.

THE COURT: Well what mechanism would you suggest to locate and appoint such a person?

MR. BRADFORD: I believe Your Honor could appoint someone as you appointed the examiner. I also believe that we could allow the examiner essentially to serve in that capacity with respect to the issue of what claims should be permitted and what claims should not be permitted. And there should be some threshold determination --

THE COURT: So you think it would be a -- the

examiner who's determined that claims against your client have no merit would be a fair arbiter of determining whether such claims should be pursued?

MR. BRADFORD: Yes, Your Honor, I absolutely do and I believe that's why Your Honor appointed the examiner in the first place. He came to this proceeding with no independent -- with no interest to promote any particular plan with no agenda other than trying to get at the truth. As Your Honor knows, $12 million of estate money was spent to get at the truth. And if somebody can come forward and rebut what he has shown, that's certainly a determination for Your Honor to make. But in the absence of some evidence as to why the examiner got it wrong, that's a pretty good starting point for what is in the best interest of the estate.

In the *Maxwell* case, Judge Posner specifically held that any time you have a litigation by trustee, a similar situation with a litigation trust, the incentives are fairly skewed. Insofar as it's very easy to say this is a large claim. It may have a fractional change of success, but what's the harm in pursuing it? And Judge Posner wrote and other Courts have followed the same reasoning.

We've cited these opinions that the Court needs to exercise some gate keeping function over that. That specifically those expenses that are not reasonably in the

best interest of the estate should not be permitted. That Rule 11 should be applied with some vigilance and that was the same ruling that the Court reached in *Adelphia* in saying I'm not going to give releases, but on the other hand, I'm going to apply Rule 11 in a meaningful sort of way. Because the parties don't have the usual incentives that private parties do in making their decisions about whether to spend money on litigation or no. And as a result, there needs to be some gate keeping mechanism for someone independent of those trying to persuade creditors that they're going to get the biggest bank and the largest recovery regardless of how specious or frivolous the claims to make that decision.

There needs to be Rule 11 determinations. We have tried to T up a Rule 11 motion. I will be back in two weeks to try to get that before Your Honor. We can certainly try to raise these issues again by way of standing, but what I'm speaking to today really are the institutional safeguards against the pursuit of frivolous litigation. And one of those safeguards should be a part that is truly independent and objective of valuating whether or not these claims are in the best interest of these estate.

Ultimately, I believe that's Your Honor's determination, but to the extent that someone is going to look at that before Your Honor rules on it, I do think that

is a role that the examiner has played. That was one of the reasons I believe the examiner was engaged in this case and that his work should not be discounted.

So to summarize, specifically, we object to the indemnity provisions that would deny ongoing legal fees in this circumstance. We object to the exculpation provision particularly insofar as it would curtail Rule 11 liability. And we would ask that as it pertains to the issue of whether claims against Mr. Zell specifically because I do think his circumstances are unique by reason of the examiner's findings and confirmed by Professor Black's testimony, whether those claims should be pursued, that that is an issue that should be made by an independent party and hopefully the Court would address it in the context of standing on Rule 11 before we got that far.

THE COURT: Well he's presently a defendant in the lawsuit that's currently stayed. Why shouldn't that be resolved in connection with the adversary matter?

MR. BRADFORD: We don't -- we believe it can be resolved in connection with the lawsuit by way of an early Rule 11 motion and that's precisely how we've tried to address this. What we don't think is appropriate is to leave this claim pending for any greater length of time because there are I believe unfounded allegations that are reputationally injurious and we have a stay in that lawsuit

that essentially allows these allegations and promises of recovery to made without affording a real chance to respond to that in the litigation.

THE COURT: Well what if the plan were to be neutral and leave to resolution of those issues to disposition of the adversary?

MR. BRADFORD: First, we again, believe that all Rule 11 issues should be preserved, indemnity rights brought, and then we would still submit that the question of whether or not any estate money should be spent on those claims is a threshold issue for this Court. That whatever cost there is in that motion practice is needless cost. Whatever waste there is of the DNO policies is needless.

And I think most importantly, that this Court has some obligation not to put its imprimatur on lottery ticket litigation. And that's what Judge Posner held that it's not enough to say that will get sorted out somewhere down the road in litigation. If it's going to be part of a plan that this Court approves and sanctions, that there needs to be some judgment made about whether that's really a fair and equitable expenditure of funds. And that at least requires that the claims not be frivolous, that they meet Rule 11 standards, colorability standards, best interest standards. And that's a determination that should be made as a gate keeping function before the litigation is allowed to go

forward. And in that sense, we think it makes more sense for Your Honor to address those issues early on as we've sought to do in responding to the standing motion at an earlier time.

THE COURT: So we should have the hearing that we never had.

MR. BRADFORD: That's correct, Your Honor.

THE COURT: I tend to disagree with that. At least at the confirmation stage, but I -- look, I hear your concerns. I've heard them all along.

MR. BRADFORD: I appreciate that, Your Honor.

THE COURT: And I, you know, I understand your client's position. Okay. Anything further?

MR. BRADFORD: Not on these specific aspects of our objection. As I mentioned, there are what I would call more discrete objections which go to the issue of the priority of treatment of EGI-TRB under the plan, the bridge settlement. And then there are some other objections that will come later in the agenda. It was my expectation that Ms. Steege, my partner, would address those other objections. I know it's close to the lunch hour and I don't know how Your Honor would like to proceed.

THE COURT: Well let's go a little while longer, I'm building up a great appetite.

(Laughter)

MR. BRADFORD: Right. I'm going to ask Ms. Steege to address those issues.

THE COURT: Thank you.

MR. BRADFORD: Thank you, Your Honor.

MS. STEEGE: Good morning, Your Honor. Catherine Steege on behalf of the EGI-TRB.

And the first issue I am going to address is the question of the priority of the EGI-TRB notes. EGI-TRB holds approximately $300 million in notes against the Tribune. We have -- the class, the EGI-TRB class has voted no on the plan triggering the cram down provisions of Section 1129(b) which require that the plan satisfy the absolute priority rule. We would submit that neither the DCL plan nor the noteholder plan satisfies that rule because neither plan makes it clear that the EGI-TRB notes are senior to the PHONES securities.

In response to this objection, the DCL plan proponents state in the chart that they filed last week that they really don't think that the issue needs to be resolved today. They point to a statement made in their confirmation memo filed before the hearing begin which states that if and when there are funds available to distribute to either of these two classes, then the issue of who's entitled to those funds can be determined at that point in time.

The problem with that resolution, well that

resolution might be acceptable, the problem is is that Your Honor's not going to be confirming their confirmation brief. What Your Honor is going to be confirming is a plan or reorganization and entering a confirmation order. And the plan itself is not clear in this respect. It does not reserve the issue. It doesn't really address the issue, right on its face, one would read that the two sets of the notes and the PHONE securities are being treated as if they are equal claims and equal priority.

THE COURT: Or some other Court of competent jurisdiction --

MS. STEEGE: Or you resolve it.

THE COURT: -- could decide that issue, too.

MS. STEEGE: Right. But another Court of competent jurisdiction is going to want to see that it's clearly been expressively preserved in a confirmation order and in a plan, not in a brief that's filed prior to confirmation that doesn't really -- doesn't itself get approved by the Court. So that is our position with regard to the subordination, absolute priority rule objection. With regard to the objection that we've made, we've made an objection, a narrow objection, to the provisions of Section 9.12 of the DCL plan. And when the bridge lenders withdrew their plan and came on board with the DCL plan, changes were made to the plan which provided that the bridge lenders

would be reimbursed for their fees and expenses up to I believe under the current amendments it's $7 million, but they only get those payments if they support the DCL plan and take no positions inconsistent with confirmation of the plan. In short we think that this is an inappropriate, not to be pejorative, but it's basically a bride. There's no basis in the bankruptcy code to allow the bridge lenders reimbursement for their fees and expenses. They're not a secured creditor that's over-secured that's entitled to collect that under Section 506(b), simply because they withdrew a plan. That's not a substantial contribution. No one is suggesting it is under Section 503(b). In their chart of objections they say well, they've resolved one objection by making Your Honor have approval of the reasonableness of those fees. That's a start, but there's no legal basis to be giving them fees in the first place. And we would submit that that particular provision of the plan is inappropriate and that this allowance of fees for a creditor who is not entitled to it should not be confirmed.

THE COURT: Well, let me ask the question as carefully as I can articulate it. What makes this proposal different from what I find is a common dynamic in bankruptcy proceedings and that is a party who wants something, bargaining for the other party's acquiescence or cooperation? What makes this different?

MS. STEEGE: What makes it different, Your Honor, is the creation of a claim for this party that they would not otherwise be entitled to under the code. The code specifically provides for reimbursement of expenses and fees to certain creditors if they're secured and they're over-secured under Section 506(b). It might allow for recovery of expenses under 503(b) if a party has made a substantial contribution. But the case law is pretty clear that proposing your own plan, withdrawing your own plan, these are things you're doing for your own benefit, not for the benefit of the estate as a whole and you don't get a substantial contribution claim. There's no basis in the code to provide this type of claim to induce their cooperation. That's different than reaching an agreement over a claim that the code would allow to be paid under a plan, agreement you're going to pay a creditor a certain percentage amount on their claim in exchange for their support of your plan, you're dealing with a claim the code recognizes. Here you're creating something out of whole cloth simply to get their support to go on board. They should support the plan or not, but they shouldn't be doing it because they're going to get $7 million in fees for doing so. Then every single other creditor that the debtor wants to induce could come in here and say I want my fees paid, too, and there's no legal basis for that and that's why it's

wrong. Thank you.

THE COURT: Thank you.

MR. SOTTILE: Your Honor, James Sottile of Zuckerman Spaeder, Special Counsel to the Official Committee of Unsecured Creditors. Mr. LeMay of Chadbourne will be addressing the legal points raised by Jenner Block, Counsel for Mr. Zell and EGI-TRB.

I rise to ask the Court's indulgence to speak for two or three minutes about those arguments by Mr. Bradford that I think went a little beyond the legal objections that he was presenting, in particular arguments about what happened on standing and when claims should be pursued and what Determinations were made about the merits of claims.

THE COURT: You can do that in two to three minutes?

MR. SOTTILE: I believe that I can, Your Honor.

THE COURT: Go ahead.

MR. SOTTILE: Your Honor, let me just say what -- where we fundamentally disagree with Mr. Bradford. There was no Determination by any of the parties that agreed to the April settlement that there was no basis for claims against Mr. Zell or EGI-TRB. There was simply a settlement under which for the consideration given at the time and based on what the parties knew at the time, they were prepared to release those claims. Nobody decided there was

no basis for them. Mr. Bradford told the Court that the examiner vindicated Mr. Zell and suggested that the examiner's conclusions show that claims against Mr. Zell have no merit and are frivolous. None of that can be found in a fair reading of the examiner's report, Your Honor, as I know the Court will conclude when it reviews the report in detail. The examiner found that various claims were reasonably unlikely to succeed, somewhat unlikely to succeed, and so forth with respect to Mr. Zell and EGI-TRB. I submit, Your Honor, that's the stuff of litigation. Litigators all the time pursue and win claims that one might look at at the beginning and say you know less than 50/50, but you have a real chance of success. That's all one can fairly infer from what the examiner found. It is for some Court down the road that's hearing the merits of these claims to determine whether or not those claims will succeed or not.

You also heard Mr. Bradford allude to testimony by Professor Black, an expert speaking on behalf of the DCL plan proponents about value of the claims against Mr. Zell. I want to be very clear, Your Honor, that Mr. Black's views, Professor Black's views about the merits of claims against Mr. Zell and associated entities are not the view of the Committee. The Committee believes that those claims have substantial merit and should be pursued.

Finally, Your Honor, I would submit that the right way to deal with these issues, this sort of attempt to pre-litigate in the Bankruptcy Court the merits of claims that ought to be resolved later on in the adversary proceeding, to litigate that as part of confirmation hearings is inappropriate. The claims have been asserted, the actions are stayed, they should remain stayed until the Court concludes these confirmation proceedings, at which time they're going to end up in some litigation trust. The Trustee of that trust can make a Decision as to whether or not the claim should be pursued. This Court can review that Decision and can entertain motions to dismiss and can ultimately deal with the merits of the claims. It's not a confirmation objection.

THE COURT: Well, let's assume for the moment, without deciding, that you then agree that the plan should be neutral with respect to any rights Mr. Zell or related entities should be able to assert in the adversary. Are there changes that should be made in the proposed plans to make that clear?

MR. SOTTILE: Your Honor, I don't believe that anything in the plan that the DCL proponents have submitted to the Court purports to limit in any way Mr. Zell's and EGI-TRB's ability to litigate fully the merits of claims. And if Mr. Bradford believes there is something, they should

point it out to us because we are not intending to have this Court in confirming a plan, make a Decision about whether or not those claims will ultimately succeed or not or whether or not the litigation trust that will be prosecuting the claims should pursue them. We believe they are avowed and meritorious claims, but ultimately the Decision about whether to pursue them is one the litigation trust should make without the plan telling them one way or the other how they should proceed.

THE COURT: All right. Thank you.

MR. SOTTILE: Thank you, Your Honor.

MR. LEMAY: Good morning. Good afternoon, Your Honor. David LeMay from Chadbourne and Parke of the Official Committee of Unsecured Creditors. The Zell and EGI-TRB attorneys have given me a number of things that I guess I should deal with. With the Court's permission I'm going to proceed in not exactly the order that they did. I think I'll first address the two arguments made by Ms. Steege with a view of getting in effect clearing out the underbrush because I don't believe it's any more than underbrush. First with respect to the relative priority of the DCL plan on the one -- I'm sorry -- of the PHONES notes and the EGI-TRB notes as between each other, at least as it relates to the DCL plan. I believe that the DCL plan is extremely clear that it does not purport in any way to

resolve that relative priority dispute. If you look at the definitions in Section 1.1.42 and 1.1.43 of the DCL plan, those define the Class 1L litigation and Class 1L creditors trust interests, which are the distributions to be received on the EGI-TRB notes. And what they say is that essentially they're going to get these litigation trust distributions and then it goes on with a proviso to say that until the holders have allowed senior note claims on the one hand and there's no dispute as to that and then B, the holders of any other allowed claims that are entitled to share in the parent trust -- the parent GUX [ph] trust preference and to the benefit of the contractual subordination of the EGI-TRB notes receive payment in full, then the EGI-TRB notes will not receive any distribution. So that definition intentionally and purposefully leaves open the relative priority as between those subordinated notes and the PHONES subordinated notes. I think Your Honor should decline any invitation to take on that issue now, both because you've got an awful lot else on your plate, but just because there's no good reason to do it and indeed I have a strong suspicion that ultimately it will prove not to be as much of a dispute as people are suggesting it might be, for the simple reason that I don't think there's anything there to fight about. Your Honor will remember that colloquy that happened at the January 24 hearing when Mr. Rosenberg, on

behalf of the PHONES holders or a subset of the PHONES holders, very candidly told the Court that he didn't think that -- he said it is very unlikely the PHONES -- I'm quoting now -- that the PHONES are going to be able -- are going to see a significant recovery here, if any recovery at all. And of course the indenture trustees counsel for the PHONES wanted to unsay that and I had some fun with it. But I think it is an open secret in this courtroom that the subordinated classes are probably quarreling about nothing. So for all those reasons, Your Honor, I would urge the Court not to reach out and attempt to bite off this unnecessary issue of the respective priority of these two subordinated classes. I think our plan is perfectly clear that it doesn't purport to prejudge that issue and if people -- if the Court wants, I should say, for us to make that clearer in bold print or somewhere else, I don't see any reason we wouldn't do that. So I think that's a phony issue in effect, Your Honor.

THE COURT: Well, then if it's so easy to make it go away, why not just make it go away?

MR. LEMAY: We could add a sentence to our plan.

THE COURT: All right.

MR. LEMAY: I don't see any reason we couldn't do that. With respect to the bridge loan settlement, I'm kind of amused you know. That is the one aspect of what we've

done that the noteholders and Aurelius actually have not taken us to task on. If the bridge settlement was such a rotten deal and was giving away money that ought not to have been given, I'm quite confident that these gentlemen over here would have called our attention to it. They didn't do that. In fact, their most recent supplemental filing seems to suggest that they'd be willing to embrace the bridge settlement itself. It's actually a pretty good settlement. We settled a billion six of potential liability for $64.5 million or approximately four percent of the total. A portion of that is in effect stated to be on account of legal fees, it is stated to be subject to the Court's approval, so I think we've met the Court approval requirement that's come out of some of the recent case law here, but I think the way to look at it is the way that Your Honor looked at it in your question to Counsel, which is in effect what we're doing is settling this $1.6 billion claim for $64.5 million. A portion of it is allocated under the settlement to legal fees. I think that is more of interest to the bridge proponents than -- I'm sorry -- to the bridge lenders than to the DCL proponents. I think the way to look at it is what did the estate get from this and of course what the estate did get was that the bridge reserve, the initial amount of $77 million satisfied that settlement and left money left over, I think it was about $13 million, I'm

subject to correction on that, left money left over to be distributed to the bondholders and to the parent GUX. So I think all in all that was a very good settlement and I think Your Honor hit the nail on the head when you suggested that this is just how claims get resolved in the attribution of a portion of that consideration, subject to your Court -- to Your Honor's approval to legal fees I think is just not problematical. I think that really is more of an internal kind of scorekeeping mechanism within the bridge community itself. So those issues I think, Your Honor, should come off the table relatively quickly.

I'm going to turn now to some of the things that Mr. Bradford talked about. I was perplexed -- well, first as to the inadequate safeguards against frivolous litigation. I think we've all heard Your Honor pretty clearly. Mr. Sottile has made that remark. You know it's -- it should not come as a surprise that there is a spotlight on Mr. Zell, I mean and I'm told that in naval circles when a ship sinks out from under a captain, there's usually an inquiry and here, if I may use one of my famous analogies, Mr. Zell and his colleagues designed and built a ship and they launched it and they commissioned it and they put a crew on it and it sailed about 100 yards into Lake Michigan and sunk to the bottom of the ocean, it is hardly surprising that they are the subject of attention from lawyers under

those circumstances. Mr. Sottile has explained to you that I don't think the plan puts any undue levers on that process. I'll address exculpation and indemnity in that context because I think those are the undue levers that Your Honor may have been questioning about when you asked your question and I hope I got that right.

So let me turn to the indemnity and exculpation questions that have been raised by Mr. Bradford. First as to the exculpation, I think that's an easy one and it is a -- it's a textural one. The relevant text is Section 11.5 of the DCL plan and it basically sets forth an exculpation starting with the words to the fullest extent permitted under applicable law, which is an interesting way to start because I think it gives the Court and all parties comfort that in effect it is self-regulating. If, as Mr. Bradford suggests, this paragraph otherwise might have been deemed to somehow write Rule 11 out of the bankruptcy rules and I don't think it does that at all, I think that savings clause at the beginning should totally take care of that. But I think the real substance of the exculpation makes it very clear that nothing that's being done by way of exculpation does the horrible things that are being advertised.

THE COURT: Let me --

MR. LEMAY: Yes.

THE COURT: -- suggest to you how I have from

time to time dealt with the exculpation/release issues with such proposed savings language and it leaves for another time and probably more often than not for another Court, just what the extent of that -- of those clauses should be and I don't know, at least in one case recently I declined to approve that language because while sometimes it's good to kick the can down the road, sometimes it's just not the right thing to do. Why is it the right thing to do here?

MR. LEMAY: I think it's the right thing to do because and this was where I was going to go with this, the exculpation clause in this plan was intentionally and pretty narrowly tailored to measure up to Judge Walrath's recent Decision in the Washington Mutual case. I think it was no secret to any of the parties that that would be on everyone's mind and Your Honor confirmed that yesterday when you told us to think pretty hard about that. This exculpation clause looks quite a bit different from the one that we filed with the initial plan and that initial plan was pre Washington Mutual and this is post Washington Mutual. We've done our very best to make sure that the exculpation clause for example only protects, at least as to the estate fiduciaries, only protects us to post-petition conduct because that's a Washington Mutual Decision, that the related parties definition, as you'll hear later, falls within the ambit of the sorts of exculpations that would be

appropriate. So Your Honor, I totally agree. If we had written an exculpation clause that was completely off the reservation and then said to the fullest extent permitted by applicable law, then I think that would be a very, very valid criticism from the bench. Why should I have to do this? But I think here and I know you've asked the parties to address this tomorrow, the exculpation clauses really weren't just sort of you know thrown down the field. They were really written with a view of passing muster and we think they do. I don't myself see anything in this exculpation clause to bring it back to the argument that's in front of the Court right now. I don't see anything in here that says litigation trustees are going to be exculpated from Rule 11 violations.

MR. GOLDEN: Your Honor, I might save some time just by clarifying the scope of our objection. Thank you. Our objection is not to 11.5 which is being referred to, but we're referring specifically to 13.3.7, which deals with exculpation of the litigation trustee and those responsible for the litigation and I apologize if I caused any confusion about the scope of the objection.

THE COURT: All right. Thank you.

MR. LEMAY: Actually don't know that that's an exculpation clause, Your Honor. I think that's an indemnification from the litigation trust in favor of the

litigation, the litigation trustee and to the extent that the litigation trust as opposed to the Chapter 11 estate is indemnifying and to the extent that there isn't a Court-ordered exculpation, I think that's a pretty different creature. Basically what this is just saying is that the litigation trust will indemnify the litigation trustee. That just doesn't seem like a very remarkable proposition to me. If the litigation trust wastes its assets by violating Rule 11, then what that means is the litigation trust and the creditors who empowered that litigation trust are going to have to eat their own cooking. So I'm not sure that that -- I'm not sure that one makes any sense. I think there'd be a more cogent objection if either A, you were being asked to use your judicial powers to craft an exculpation or B, the debtor or its reorganized estate were being put on the hook for that. So I'm not sure that's a well-taken point. I think I've beaten that one to death, Your Honor. I'll keep going.

I think the last thing I need to talk about, unless I've got my notes wrong, is indemnity. And I guess the argument that's being made is that Mr. Zell has been induced post-petition to remain as a director and that because he's been induced it is wrong to treat his pre-petition indemnity claims as pre-petition indemnity claims. And some cases were cited that purport to stand for that. I

have a couple of observations. I don't think it's quite right to say that Mr. Zell was induced to remain as a director. I suspect that he has remained as a director for the purpose of exerting, as is perfectly proper, ongoing control over the reorganizing entity until the time comes when he'll circle off the board. But the fact remains, I think it's beyond per adventure that when acts are committed by an officer or director pre-petition, those acts give rise to pre-petition claims. A case called Summit Metals decided by Your Honor, makes it very clear. And this is a decided case. This is not just one of the sort of confirmation orders, which I'll get to in a minute because I think that was what was adverted to by Mr. Bradford. In Summit Metals, in the decided case and it's reported at 379BR40, this Court has said consistently Courts have held that an indemnification claim based on pre-petition services or conduct is not a cost or expense for services rendered after the commencement of the case. Putting it a different way, pre-petition conduct gives rise to pre-petition claim and gives rise not to an administrative claim because you have not been dealing with the debtor in possession. You've been dealing with the pre-petition debtor and no benefit has been conferred upon the estate. The suggestion is made that however charters and bylaws are executory contracts and must be assumed or rejected. I think if the Court looks at our

briefing, you'll see that that's just not necessarily the law and the fact that the holdings that say that that isn't the law emanate from other jurisdictions, I don't really think is dispositive. And so for those reasons I don't think it can be said in any meaningful way that these are executory contracts that have to be assumed. I think that's contrary to the weight of the law. And the Baldwin United and THC cases that Mr. Bradford mentioned I think continue to be good law. Mr. Bradford cited three confirmation orders for the proposition that certificates of incorporation are executory contracts. He mentioned Panolam, Crabtree & Evelyn and then I think he mistakenly mentioned the Summit Metals case. I believe he meant to mention because his papers mention a case instead called NII Holdings. And I guess the only observation I have with respect to those three cases is that they are simply confirmation orders, they do not appear in any way to have been the result of a litigated decision, and I think that they're precedential value for that reason should be limited or probably discounted entirely. Excuse me. Your Honor, if I could just have a second. They did cover a lot of topics and I just want to make sure that I don't repent of yielding the podium.

THE COURT: You may.

MR. LEMAY: Thank you. I know Mr. Dublin wants

to have a word or two about some of the observations in particular that were made with respect to Aurelius as litigation trustee nominator, so I think I'm done. Your Honor, thank you.

THE COURT: Thank you.

MR. DUBLIN: Good afternoon again. For the record Phil Dublin, Akin Gump on behalf of Aurelius and the other noteholder plan proponents. Your Honor, I'll do my best not to repeat the comments that either Mr. Sottile or Mr. LeMay have made. I think Mr. Sottile put it quite succinctly and accurately as to what the examiner's report does say and what it doesn't say and that Mr. Bradford I believe reads that report with rose-colored glasses that I wish I had in connection with all my matters.

With respect to the last couple of items that Mr. LeMay touched on, the indemnity and the exculpation, again I believe the provisions being referred to in the plan, as well as in the related draft trust agreements are indemnity provisions, not exculpation provisions. With respect to the trusts under the noteholder plan, those provisions I believe are consistent with much precedent and applicable law and they carve out the extent of the indemnity to make sure that parties can only be indemnified to the extent of applicable law and likewise provides that there will be no indemnification upon a finding of fraud, self-dealing,

intentional misrepresentation, or willful misconduct. And on the heels of that discussion on the indemnity specifically focused on self-dealing is where I'd like to move into the attacks on Aurelius. And I'll do it briefly because I think that the only reason why Mr. Bradford was focused on Aurelius is because he knows that they have the weight of their conviction. They know that there are valid claims here with respect to Step 1 and Step 2, as well as with respect to the preference claims and the like that are asserted against Mr. Zell and EGI in connection with the Committee complaint that's on file, which this Court has already granted standing. And really it's an attempt by EGI and Zell to try to get Aurelius to say hey, we really want to be involved in these causes of action, we want to be on the board, so we'll drop these claims against you because we're scared. That's not the case. As Professor Rock testified, these are the exact type of people that you want to be in charge of your trust, people that are going to maximize the value of the assets. And in that regard in addition to the indemnification provision that's limiting in the trust agreements, our trust agreements provide that the members of the trust advisory boards, as well as the trustees, will have fiduciary obligations to maximize the value of the assets in the trust, the staten [ph] way, and with those fiduciary duties in the same manner that a

creditors committee has to its constituency. We do have a specific carve out because under our plan everybody is going to get trust interest, that there will be no fiduciary duty in your capacity as a member of the advisory board or as trustee against any trust beneficiary in that trust beneficiary's capacity as a defendant. Obviously that is what would create the conflict of interest if you had a fiduciary duty to somebody in their defendant capacity. Mr. Bradford goes out of his way also to say that Aurelius is really just focused on the PHONES and assuming I guess as we all believe that the senior notes are entitled to a full recovery, that Aurelius will continue to press the causes of action once the senior notes are paid in full, but I don't think he's read our plan. Once the senior notes are paid in full, the PHONES notes trustee takes over Aurelius' position. Anybody that's been appointed by Aurelius on the board is gone. It's the PHONES notes trustee that takes over at that point. Aurelius does not have a say after the senior notes are paid in full as to how that board will continue to operate.

THE COURT: I'm not so sure Mr. Bradford would consider that an enhancement of his position.

(Laughter)

MR. DUBLIN: That is probably true, but it will no longer be Aurelius that will have a say in the

prosecution of those causes of action. Moving on also to priority argument with respect to the PHONES and the EGI notes. I'll talk about it just for a minute and I think our plan is quite clear where it says that it's going to be determined at a later date with respect to whatever allowed claims there are as to who has priority against the PHONES and that is in, if you give me one second I'll tell you the exact -- I think it's in 3.9C. It's in the treatment section for the PHONES. But it's really a red herring. There are no initial distributions going out under the noteholder plan to the holders, the PHONES notes, or the EGI-TRB notes for the specific purpose that we all agree -- they are all subordinated to Step 1, Step 2, the bridge, and the senior notes at the parent company. Now if the LBO causes of action are successful, well, then the EGI-TRB notes are going to go away. They're Step 2 debt. So we're not going to have to worry about whether the EGI-TRB notes are senior to the PHONES because they won't be there. If the LBO causes of action are unsuccessful, well, then there's not going to be any value for the PHONES or the EGI-TRB notes in that circumstance, so we don't have to worry about it at that point. So I think it's really a red herring as to whether the PHONES or the EGI notes are senior, which is senior to each other or whether even they're pari passu. I think that the order of reading if

the Court -- if this Court or any Court is eventually going to determine which is senior, the PHONES or the EGI-TRB notes to the extent that is ever necessary, which again I say it is not -- the right order is to read the PHONES notes, indenture trust -- indenture first, followed by the subordination agreement for the EGI notes because the language that Counsel for EGI-Zell read from the PHONES indenture is strikingly similar to the language that's in the subordination for the EGI notes, which provides that the EGI notes will be subordinate to all senior obligations and senior obligations are all obligations, indebtedness and other liabilities of the company, meaning Tribune company, other than any such obligations, indebtedness, or liabilities that by their express terms rank pari passu or junior to the company's obligations under the subordinate notes. There's nothing in the PHONES notes that say anything about the EGI notes because the PHONES notes trust indenture came first and by the fact that this agreement came second, if they wanted to be senior to the PHONES, they would have said so, but they didn't, so I think that is the proper order to read them in.

I think I may have covered everything that was necessary here. I'm just going to take a quick look as well. One more second, I believe I have -- that's all I have.

THE COURT: All right. Thank you.

MR. SIEGEL: Martin Siegel of Brown Rudnick on behalf of Wilmington Trust, the indenture trustee for the PHONES. Much of what I was going to say, Your Honor, has been said. I incorporate Mr. Dublin's argument. We don't believe if you read -- if you were to decide the issue that you would decide that when in 2007 when the EGI note was prepared and they said we're only senior basically -- you have to say that you're going to be subordinated. They could have amended the PHONES if they wanted to, they could have said so in the EGI subordination agreement. They didn't. We think if you ruled on it, you would rule that the PHONES are not subordinated to the EGI note. However, we agree that you do not need to decide the issue now, the way the plans are written, we're not entitled to a distribution at the -- right now.

Now we've heard more than two weeks of testimony and we disagree with Mr. LeMay's statement that we will ultimately not get a substantial distribution. But that's for a later date. Your Honor has enough on his plate, so on behalf of the indenture trustee, we are not insisting that you resolve this issue now. When Your Honor enters a ruling on the other issues that you have before you, we believe that at that point there will be a need to resolve it because the PHONES will get a substantial distribution. But

that's not for today. You have enough to decide.

THE COURT: Well, as I sit here and listen to the respective arguments, I recall an argument that was made on a similar issue and I think it was in Spansion. And there the plan changed in its terms with respect to dealing with the priority issue and one version of the debtors plan said well, we'll issue stock in accordance with whatever the priority turns out to be, but we make no position -- take no position about it now and one party argued therefore I have no jurisdiction to determine the dispute about who came first. Then the plan changed and made a choice about who came first, so I think I put the issue squarely before me, which I had to decide. So I then ruminated about whether here depending upon the valuation decision, which I have to make in connection with confirmation, would mean that depending on the number I would have to decide the issue, but if it's not high enough I might not have to until later or another Court might not have to until later, depending upon the success of the litigation outcomes. Okay.

MR. SIEGEL: Your Honor, if you'd like to decide another issue, we'd be more than happy to submit whatever you -- how you want to do it.

THE COURT: Yeah. I've run out of my invitation stationary, Mr. Siegel.

(Laughter)

MR. SIEGEL: Thank you, Your Honor.

THE COURT: All right. Is this an appropriate time for a break?

MR. SOTTILE: Yes, Your Honor.

THE COURT: Okay. Mr. Sottile?

MR. SOTTILE: Yes, Your Honor?

THE COURT: I'd like to ask you to revisit now your time estimate on getting through these objections and --

(Laughter)

THE COURT: -- whether we're still on track or whether there might have been a bit of slippage.

MR. SOTTILE: Actually, Your Honor, I believe that we are on track. We had anticipated that this morning's objections would be rather lengthy and I still anticipate, although I will look around and make sure that I'm not going to be corrected by any of my colleagues, I still anticipate we should complete today. I think that we are optimistic, Your Honor, that we can continue and complete the third party objections today.

THE COURT: Listen, any time a little optimism sneaks its way through in this case I'm happy. In terms of numbers of hours, what do you think?

MR. SOTTILE: Your Honor, my best estimate would be that we need another three to three and a half hours.

THE COURT: Okay. Anything before we break? Court will stand in recess until 2:00.

(Recess from 12:49 p.m. to 1:59 p.m.)

THE COURT: Good afternoon.

MR. BRADFORD: Your Honor, David Bradford on behalf of Mr. Zell. Briefly a point of order before we leave this last objection. Over the lunch hour a Bloomberg Report issued with a headline which read, "Claims against Tribune Chairman Zell 'have merit' bankruptcy judge says." Your Honor is then quoted as having found that the claims against Mr. Zell have merit. I'm confidant that Your Honor made no such Determination. I would ask Your Honor to clarify for the record that you made no such Determination.

THE COURT: The record will speak for itself. I do not make a habit of responding to press reports for reasons which I'm sure you understand.

MR. BRADFORD: Your Honor, I do think -- I will state for the record and I've consulted with other Counsel that no such statement was made by the Court, that the issue of whether these claims have merit was not before the Court today and that there was no such Determination. So I think unfortunately this illustrates why we are trying to get this issue resolved sooner rather than later because there are serious reputational consequences to these kinds of unfounded articles. Thank you, Your Honor.

MR. LANTRY: Kevin Lantry on behalf of the Debtors, Your Honor. This now brings us to the last of the third party objections to both plans and that has to do with contentions about the creditor trust structures that are in both plans and EGI indicated they'd like to fall back a little bit, so the foundations I believe have the first objection on this.

THE COURT: Very well.

MR. RILEY: Good afternoon, Your Honor. Richard Riley from Duane Morris on behalf of the Robert McCormick Tribune Foundation and the Cantigny Foundation, which I'll refer to as the foundations.

Your Honor, you heard some of our argument at the March 22 hearing in connection with the foundations objection to the noteholders motion for determination that they retained their state law fraudulent conveyance claims. This will -- our arguments will amplify a little bit of what we said at that hearing, Your Honor. I don't think there's any dispute among the parties as to what the intent and the motivation is for the creation of the creditor trust under both of the plans. The Committee has already sued the foundation and other former shareholders for -- to try to recover shareholder payments made as part of the 2007 LBO under an intentional fraudulent conveyance theory. The Committee intentionally did not sue the foundation and the

other shareholders, the other former shareholders, under constructive fraudulent conveyance theories. So under both plans the only thing being assigned or conveyed to this creditor trust is these state law fraudulent conveyance actions. As I'm sure Your Honor is aware, the Third Circuit has found that you know these shareholder payments like the payments that the foundations have received, are protected by 546(e) under -- if they're brought under by a trustee for constructive fraudulent conveyance. Given the 546(e) limitations, the plan proponents have concocted the creditor trust mechanism under each of the competing plans, simply to try to evade 546(e) of the Bankruptcy Code. In doing so, Your Honor, the foundations assert that the creditor trust provisions of the competing plans violate 1129(a)(1) and (a)(3) of the Bankruptcy Code. We have two main reasons, Your Honor. First is somewhat duplicative of what we argued back on March 22. By assigning the -- trying to assign the creditors state law fraudulent conveyance claims to this creditor trust --

THE COURT: Do you mean unsuccessfully argued on the 22nd?

MR. RILEY: Well, Your Honor, I guess -- the issue I guess -- that's a point of clarification I guess. I guess some of us, me included, are unclear of what was actually ruled on at -- on March 22.

THE COURT: I have to say that ruling from the bench set a record for confusing others involved.

MR. RILEY: Yeah. Because as you know, Your Honor, there's competing certifications to Counsel, I believe --

THE COURT: Oh, I know.

MR. RILEY: -- based on that ruling.

(Laughter)

MR. RILEY: What we say is that the creditor trust mechanism under the plan is trying to confer standing on the creditor trustee to bring these state law fraudulent conveyance actions, but Your Honor they've -- the Committee has already brought an action for -- to recover the payments under the -- for this LBO under fraudulent conveyance theories. And once the Committee brought that action, that's the action. The creditors no longer have standing to bring the state law actions. And Your Honor, for that proposition we cite in our objection the National American Insurance Company v. Rupert Landscaping case. And in that case the Court found that a creditor could not bring a similar cause of action to an action that the trustee was bringing where the actions had the same similar focus. And Your Honor if you think about it, if this creditor trust mechanism were to be approved and go into effect, you will have competing causes of action for the same dollars arising

out of that LBO transaction.

THE COURT: You're right. That was the same argument that was made and I thought I was clear in that to the extent that was an objection and I had overruled it as -- for the reasons that as certain parties argued that's just something to be sorted out later and Courts have a way of dealing with that and they do.

MR. RILEY: Well, Your Honor, then I'll move on to the -- I guess you're saying that's overruled. The second reason we contested --

THE COURT: Well, you know Mr. Riley if you can tell me -- you quite properly acknowledged at the outset that it was like the objection that was made before, which I thought I'd overruled. But I see no difference in the argument here either.

MR. RILEY: Well, our position is since the Committee has commenced the action, you're going to have competing causes of action for the -- for basically the same dollars. It's going to be a --

THE COURT: I acknowledge that that might be a possibility.

MR. RILEY: And Your Honor, I do point out that -- where is it -- in the Klingman [ph] case, which is one of the cases cited by the noteholders for the proposition that once the two year statute of limitations under 546 for the

trustee expires, that the creditors regain or can assert these causes of action, but the Klingman Court actually said -- it's an apt quote. It says this holding should not be construed as suggesting that creditors may vie with the bankruptcy trustee for the right to pursue fraudulent conveyance actions. To the contrary, the commencement of a bankruptcy case gives the trustee the right to pursue fraudulent conveyed assets to the exclusion of all creditors and they cite 546(a) and they -- but they say however the trustee does not retain this exclusive right in perpetuity, the trustees exclusive right to maintain a fraudulent conveyance cause of action and the creditors may step in or resume actions when the trustee no longer has a viable cause of action. And in this case the Committee has brought a viable cause of action for the return of the shareholder payments. So our argument would be with that they don't have standing to bring them and it's going to cause all sorts of problems after the plan is confirmed.

THE COURT: Well, I acknowledge that the potential exists, but as I said and as was argued before Courts have a way of dealing with that and the noteholders also had a notion that it might help prompt resolutions and I tend to think they're right about that.

MR. RILEY: Your Honor, the other reason we state that the creditor trust would violate or would not be

brought in good faith under 1129(a)(1) or (a)(3) is that our position is that 546(e) of the Bankruptcy Code preempts the state law fraudulent conveyance actions and the creditor trust mechanism is just a clear attempt to sidestep 546(e). And Your Honor, I would cite to you the Hechinger's Decision by Judge Walrath, which I'm sure you're aware of, in which she found that 546(e) preempted an unjust enrichment claim that sought to recover you know under similar theories as fraudulent conveyance.

THE COURT: Well, it came up in a different context, but the Third Circuit decided recently in Visteon that the enhanced protections given to employee benefits by Section 1114 was intended by Congress and it did actually offer more than arguably was available outside of bankruptcy, which is somewhat unusual as the interplay between bankruptcy and non-bankruptcy law typically goes. Here what in effect is maybe happening is that while there's the protection in bankruptcy, after bankruptcy maybe it's not and maybe that's what Congress intended.

MR. RILEY: But Your Honor --

THE COURT: Tell me why that's not a fair reading of the code.

MR. RILEY: Well, Your Honor, I think Congress intended to protect the exact kind of transaction that's trying to be unwound here. I mean if you look at what

Tribune is trying to do, the noteholders or the debtor committee lender plan is trying to do, they're trying to unwind billions of dollars of securities transactions that's going to involve thousands if not ten thousands of shareholders. If you look at the Committee complaint as an example of what will be the state court litigation, I think the Committee complaint, the caption goes on for at least two pages and it has a -- close to a 500-page exhibit of additional plaintiffs. And Congress in passing 546(e) was trying to give some certainty to the financial markets that these types of transactions couldn't be unwound. So Your Honor, it's just that this whole mechanism is --

THE COURT: Or maybe that bankruptcy couldn't be used to unwind them.

MR. RILEY: Or once a company decides to file bankruptcy, they cannot unwind them. And I don't think it stops with confirmation. Once the debtor decides to file bankruptcy, 546(e) applies.

THE COURT: Forever.

MR. RILEY: Yeah. And Your Honor, I think there's joinders.

THE COURT: All right.

MR. RILEY: I do have one last point, Your Honor. We do mention in our brief or our objection that these same arguments were actually raised by the Debtor to the

examiner, so they were -- they knew that preemption was an issue and they knew that this attempted sidestep would be problematic.

THE COURT: Well, it wouldn't be the first time I've seen a position change during the course of a bankruptcy.

(Laughter)

MS. STEEGE: Good afternoon, Your Honor. Catherine Steege again on behalf of EGI-TRB and Mr. Zell. I'd like to answer Your Honor's question with regard to why this isn't a circumstance where parties ought to be allowed to proceed outside of bankruptcy and evade some restrictive provisions of the Bankruptcy Code. The reason for that, Your Honor, is because the estate made a Determination to administer these particular claims. By making that Determination, by bringing the actual fraudulent transfer claims and the other claims that implicate 546(e), they've administered that particular body of claims. They've chosen to proceed in the bankruptcy process and creditors should not be allowed to then proceed outside of bankruptcy on the parallel claims. And I think the problem with how everyone is focusing on this is they're defining claims by looking at the legal label that's placed on the claim. They're saying if we call it this it's something different than if we call it that, but that's not how the law works in any other

circumstance. If you were, for example, looking at whether or not res judicata or issue preclusion would apply, you'd be looking at the core set of operative facts and the core set of operative facts with regard to the causes of action that the estate, through the Committee's complaint has brought, that same core set of facts, the same ultimate relief is being attempted to be sought in connection with these claims that would be assigned to the creditor trust. As to the question as to why it's appropriate to resolve that issue now as opposed to letting it be deferred until a later date, the issue before the Court today isn't whether or not Aurelius gets relief from the stay to bring causes of action in its own name. It's whether the Court enters a confirmation order that places an imprimatur on creditors abilities to assign into a creditor trust these particular claims. And I'm not suggesting, because I don't think it's correct, that you can't have a creditor trust in a plan. You can. You can have a trust for claims that are assigned by creditors that they own. The question here is do creditors actually own any claims that can be assigned into that trust and you can only get there if you determine that the claim depends solely on the legal label placed on that claim. If you look at it the way I think it's looked at every other time when you try to figure out, when you're amending a claim under Rule 15, you're applying res

judicata, you look at the core set of operative facts. When you look at it that way, the estate chose to administer these claims and by administering these claims, creditors lost the right to individually pursue those claims outside of bankruptcy. And that's the reason why this mechanism doesn't work in this plan. And if you look at the cases that both of the plan proponents cite to support this, they are all instances where the bankruptcy trustee, the estate, doesn't administer at all the fraudulent conveyance claims, doesn't do anything with that core set of operative facts. And after they don't do anything for the two-year period, creditors then come in, they revert back, they're abandoned back, and they're allowed to proceed. But you don't see any case where anyone is jointly on a parallel track prosecuting that with a trust that's got the imprimatur of the Court. And I don't think it's appropriate. It's one thing in the stay motion. It's another thing when you have a confirmation order to suggest that a Court in some other jurisdiction is going to be able to raise that issue because what will be said is the Court confirmed the plan allowing the assignment of those claim, it made a Determination that there was something to assign, so the argument that I'm making today shouldn't be made because the confirmation order borrows it and it's a collateral attack on the plan. That's why I think it becomes ripe here where it may not

have been a few weeks ago when it was argued in connection with the stay relief. Thank you, Your Honor.

THE COURT: Thank you.

MR. DOUGHERTY: Good afternoon, Your Honor. My name is George Dougherty. I'm here on behalf of certain current and former officers and directors of the Tribune. Mr. Riley covered a lot of what I wanted to cover and EGI's Counsel also did the same and I certainly heard what you said. I do want to point out that at least from our perspective, 546(e) shows Congress's clear intent that these types of transactions, those that involve securities transactions, should be protected. The plan proponents I think need to show you why that is not the case in this situation and I don't think they've made that burden and it's not what you said a forever thing. I think the way to reconcile this issue is to say that the claims that existed at the time the bankruptcy was filed and these disclaim state law fraudulent conveyance claims clearly existed at that time, that they should be subject to the 546(e) issue. And that you know perhaps there's claims outside of bankruptcy that may come later. Maybe we don't get those protections under 546, but with respect to the things that could have been brought under -- is it 547 or 548, I forget which one, those are claims that should be covered by 546 because that's the only way you can fulfill a clear

congressional determination that these types of claims should not be upset under a state law or a constructive fraudulent conveyance theory and thank you.

THE COURT: Thank you.

MR. DUBLIN: Good afternoon, Your Honor. Phil Dublin, Akin Gump for Aurelius and the Noteholder Plan Proponents. I'll be brief because I think Mr. Golden covered on March 22 substantially all of the issues that have been addressed by the objecting parties so far this morning. I would just like to note that we obviously disagree with all their positions. But as far as for one clarification, EGI-Zell made the point that creditors don't own these claims and only if they have valid state law claims can they transfer them to a trust. That's exactly what our plan says. Our plan says that creditors that are going to get credit or trust interests will only be entitled to receive creditor trust interests to the extent they have valid state law avoidance claims that can be transferred to that trust. And that -- whether there are valid state law claims that can be transferred to that trust is something that will be determined by the state court overseeing the litigation, that will likely be commenced prior to confirmation of any plan in these cases as we come up to the June 4 statute of limitations period for certain states. And all of the arguments that the objecting parties have

raised with respect to 546(e) and standing and the like, those are defenseless claims. There's nothing in the plan that's seeking to prevent those parties, just like there was no relief being sought on March 22 seeking to prevent those parties from pursuing those defenses in connection with any litigation commenced by an individual creditor or by any causes of action that a creditor trust may pursue on behalf of creditors that have contributed to that trust the valid state law avoidance claims that they have.

Other than that any remarks I have will be repetitive of the hearing that we had on the 22nd and the rulings that you made. Obviously we do have competing orders. We view that as a fact that we have objecting parties that are trying to add things into an order that this Court did not rule, but we'll wait to see the order that's eventually entered.

THE COURT: Thank you.

MR. LEMAY: Your Honor, David LeMay from Chadbourne and Parke for the Official Committee of Unsecured Creditors and also for the DCL proponents. Counsel for the foundation began his remarks by saying that some of his arguments had previously been ventilated on the 22nd. I don't think that was quite right. I think all of this was previously ventilated and what we really have here is the second pre-motion to dismiss and I think that the correct

time to be arguing motions to dismiss is on the motion to dismiss.

I will note, just very briefly, that there are two or three legal authorities that you don't hear too much about from the other side in this quarrel. One is the PHP case, which you did hear about on the 22nd. You heard about it from Mr. Golden. And the PHP case I think makes it very clear and that's a Delaware case of course, that if the claim that is being pursued is not being pursued by the estate or by a successor to the estate, then the 546(e) defense isn't applicable. Now I assume there will probably be an argument sooner or later about whether the 546(e) defense -- I'm sorry -- whether the claim is being pursued by the estate or by the -- by a successor to the estate. Taking a cue perhaps from a couple of the suggestions that the Court made this morning to first Mr. Krakauer and then to me, for our part, the Committee's part, we'd be perfectly happy to add a sentence to the plan that says as such 546(e) defenses as may exist, if any, are not impaired or are not prejudiced. And if that makes this go away, that's maybe a profitable use of our time. It is the case that in Lyondell a trust just like this one was part of a confirmed plan, so it's not like we're going anything new or extraordinary. But if putting in that kind of clause would save the day on this and give us some time to turn to some other things, I'd

be happy to do it. I don't feel, Your Honor, the need to reargue at any length these issues about what the case means when it says that the -- when the estate has possession or control of a claim, that it gets first swing or first crack and then what happens after it yields that first crack. We've been down that road. We all know what the Barone [ph] case says. So perhaps I'll let that go. I guess I'll only note that at least nobody is using the word Enron this time and that makes me happy. Thank you, Your Honor.

THE COURT: Thank you. Shall we move on?

MR. LANTRY: Sir, Your Honor, Kevin Lantry. That brings us to the objections to the DCL plan and its bar order.

MR. MCCAMBRIDGE: Good afternoon, Your Honor. My name is John McCambridge. I'm here on behalf of certain DNO's and we're objecting to the DCL plan because its proposed bar order violates 1129(a). As Your Honor knows, the proponents have the burden of demonstrating compliance and they cannot. My clients are either current or soon to be defendants in multiple actions arising out of the LBO or facing actions by a litigation trust, a creditors trust, and individual creditors.

Now I want to start with the natural state of affairs, which is that my clients have claims of contribution and non-contractual indemnity that they may

choose to bring against other individuals and entities. Now there's well-settled, non-bankruptcy procedures for dealing with those claims. We got various state laws, uniform acts, contribution acts, and those are all out there and that's what we have today. Now the DCL plan proposes to upset the natural currently existing state of affairs, the one that exists between my clients, who are non-debtors, and these other individuals and entities, who are also non-debtors. Now the DCL plan proposes to do this with a bar order that they've negotiated with each other and without any consent or participation by us. Now the background is that the debtors entered various settlement agreements with non-debtors. The appropriateness of those settlement agreements we understand has been a significant topic in this Court for at least the last month. But what we're focused on is one, apparent feature or product of those settlement agreements and that's the bar order that's included at paragraph 11.3 of the DCL plan. And the bar order that they've proposed would prevent my clients from bringing claims for contribution or non-contractual indemnity against anybody that's covered by their settlement agreements. And that seems to us as far as we can tell to be a vast array of individuals and firms, not readily identifiable at all.

Now turning to what that means. The DCL bar order is a non-consensual release of our claims, non-

debtors, against other non-debtors. So there's no question that the bar order, if entered, would release our claims. There's no question that they're non -- it would be a non-consensual release. There's no question that we're non-debtors and no question that the people being released by their plan are also non-debtors as well. So 524(e) and especially in the Third Circuit, it's very clear that they require strict special scrutiny of any such purported release. There's four factors that are relevant. Those are laid out in Continental and in Spansion. As applied to this case the four are first, is this non-consensual release necessary to the success of the reorganization? In this instance the non-consensual release, the one being imposed on us, is attached to some unknown number of settlement agreements. So the relevant question on that would be is each of those settlement agreements necessary to the reorganization and if so, is the non-consensual release being imposed on us necessary to those settlement agreements. That's factor one. Factor two, are the entities that are being released from our claims, are they providing -- making a critical financial contribution to the DCL plan? Factor three, is each of the entities that's being released on our claims making a financial contribution that's necessary to make the plan feasible? Again, these are embedded in the settlement agreements that exist that

they did with the debtor. Finally, we come to factor four. If factors 1 to 3 are met, there's a final factor that focuses on the people in the position of my clients and that is is the release, the imposed release of our claims fair, is it fair to us, the non-consenting people or entities and the issue is are we being fairly compensated for the forced release of our claims? That's factor four. That's the one we're going to focus on mostly. Let me just briefly comment on factors one to three. Now the issues there in one to three all regard the financial elements of the various settlement agreements and presumably those have been addressed at length during the hearings that have just concluded. And we're not here in a position ourselves to evaluate the showing that was made on those issues over the last three weeks or month or whatever period of time these hearings have gone on. As we note in our written objection, however, that's been a topic, it is a topic of contention between the parties in the confirmation hearing and we understand that the Court will be looking at these issues on its own in any event. And all we would note is it's up to the proponents of this bar order to demonstrate that they satisfy factors one to three.

Now assuming for purposes of the analysis that factors one to three are satisfied, that's when factor four becomes relevant. Here's the proper analysis on factor

four. We have to ask what consideration is being provided to us in exchange for being forced, if the order were entered, to release our claims. Is the consideration offered fair? Now in this instance according to the DCL proponents, the consideration given is the purported replacement of our contribution claims and indemnity claims with something that is supposed to be equivalent. And what that is under the proposal is the use in future courts, in the litigation courts, of a proportionate fault procedure, specifically that future courts will apply a proportionate fault proceeding, conduct a proportionate fault proceeding, so that our clients will be held responsible for only their portion of any liability. And that's it. That's what's supposedly being offered to us. And the DCL proponents say well, that's fair consideration. You're getting the equivalent of a contribution claim, the bar order says well, any court in which you're sued by the litigation trustee, the creditor trustee, individual creditors, they're already talking about bringing cases all over the country, as Your Honor knows. Any of those future litigation courts will have to apply the proportionate fault hearing, conduct a trial, alongside the liability trial for our clients and make sure that we are, if found liable on anything, required to pay only our proportionate fault. Now what's the problem with this? As I said, first and foremost according to the

DCL plan and recent events, we're allegedly going to face multiple suits in multiple jurisdictions, state and federal, around the country. As I said Plaintiffs including litigation trustee, creditor trustee, and now individual creditors. Without the bar order we have our claims of contribution and indemnity and the attendant statutory case law, protections that have developed over the years. With the bar order we don't. Now is it sufficient for the bar order to say future litigation courts will do this? That's essentially what it says. And what we are concerned about and what we have raised on February 15 and ever since is what happens if one of these other courts does not apply the proportionate fault provisions, does not conduct a concurrent hearing to be sure that we're entitled and get the benefit, such as it is, of the bar order, of the proportionate fault reduction. Again, remember this is their plan forced on us. Our position is that if a court were not to apply the proportionate fault procedures in full, that the burden of that failure has to fall on the DCL proponents and whatever plaintiff has brought that claim. It cannot be imposed on us.

What does the DCL's proposal do? It does impose it on us. Their written response on this issue says you know there's a low probability that a court elsewhere would not fully apply the proportionate fault proceedings, but if

that happens, tough luck for you, that it's our problem, we can come back to this court, but the people who are suing us are not under and enjoined by the bar order. And under their procedures we can well be in Court in any number of jurisdictions, Oklahoma, Cook County where I'm from, with a judge that doesn't think that he's going to apply it. He doesn't conduct imaginary trials. He doesn't like the empty chair. We've all been there. Anybody that's been -- that's tried cases around in different jurisdictions knows that different judges run their courtroom their way. So for us to be exposed to the possibilities and it's crystal clear we are, that the proportionate fault procedures are not followed by future courts, means that were are not getting consideration for the forced release of our claims. And that's utterly unacceptable to us. It's not fair and it's wrong on multiple levels. The only consideration or compensation that we're allegedly getting for these non-consensual releases is a proportionate fault hearing and determination. If we don't get that, the consideration has failed. No consideration, no compensation, that's unfair, it's inequitable and it's a violation of 524(e).

In addition, the way that they've got this constructed, if you look at the plaintiff's incentives, according to this the plaintiff does better if the proportionate fault rule is not applied. Why is that?

Without the proportionate fault rule and without us being able to bring contribution claims, the possibility is clear that we could be hit for the full amount of damage, without use of proportionate fault, and without contribution. What does that mean? Their recovery goes way up and beyond what's envisioned allegedly by this rule or by this order. And that's their incentive. Essentially they've got opportunities for double recovery. Can I imagine a plaintiff somehow looking for a jurisdiction that might not follow an order from this court? It's possible. Now it's also just not acceptable under the law. This is their plan. If the litigation court does not deliver in proportionate fault, the burden of failure has to rest, would have to rest on the proponents and whatever plaintiff is trying to take advantage of the bar order -- of this procedure. So the burden of failure has to be on them. This is their plan, non-consensual, imposed on us. That's not what this order says at all and it's very telling what it doesn’t say. It does not put the burden on them of a court not going forward and applying this. The only way perhaps that you could deal with this would be by including in the bar order itself, an injunction, a set of injunctions directed against the plaintiffs, the people that the DCL proponents are pushing forward here and that are going to be the people suing us, right? So some of the things that you might have in such an

order would be that any plaintiff suing us would be barred from seeking any amount greater than the proportionate liability, if any, of the non-settling defendants, us. That's what was done in the Eichenholtz [ph] case in the Third Circuit. In addition, other things that you would have to have would be if a litigation court were not following through on applying the full protections of proportionate fault. The plaintiff in the order entered by this court, the plaintiff should be subject to injunction, being adjoined immediately, that they cannot proceed in that other court. Stop. Full stop. In addition, issues about prohibiting a plaintiff once again in any order entered by this Court, asserting jurisdiction over that Plaintiff in this order saying you can't take any steps to have any judgment that's entered -- any judgment against us entered, enforced, collected, etc. If the proportionate fault rules are not applied, you're enjoined. And these are -- granted these are potentially complicated issues to get the injunction right. It's not even attempted here, not even attempted.

Additionally there would be jurisdictional issues that are also not addressed here. For example, this court certainly has jurisdiction over the litigation trustee and it would be easy to add that entity or person in. And the DCL plan itself does provide for continuing jurisdiction by

this Court, I understand over the litigation trustee. The creditors trustee, though, a creature of this court created by this court, also somebody that could be subject to an injunction in this order to make sure that things are done properly. I understand the DCL position to be there's no jurisdiction of this court over the creditors trustee in the future.

As for individual creditors, you've already dealt with the fact that these lawsuits are apparently coming and any individual creditor who is operating as a plaintiff, the same thing would have to apply. There would have to be a method by this court in this order to enjoin any other plaintiff, anybody that's suing us from avoiding the proportionate fault rules and then stopping the litigation if it's not applied.

So in our view the DCL plan does not measure up at all for this critical issue in terms of factor four, under Continental and Spansion. The way it's structured we are not being given appropriate fair and actual consideration in exchange for the loss of these claims. And for that reason it fails 524(e).

Now there are other problems with the DCL bar order, so that even if the burden of failure issue and the injunction issue were resolved as to all of the potential plaintiffs, there would be other issues. One, you've got to

be practical I think with regard to the drafting of one of these bar orders. The notion is that you'd be bringing this to another court that's not a bankruptcy court, maybe a state court, with little experience in a lot of these issues. If you read the bar order that's proposed, it ought to be self-contained and intelligible to other courts. This one is not. You read it and it would require all kinds of reference back into the plan and it really -- I bring this up in part because the unintelligibility of the bar order as proposed really only heightens, increases the chances that a state court judge would either ignore it or get it wrong. So that's an additional problem that's intertwined with the first part of the argument. In addition, the -- to be equivalent to a contribution claim and I'm not saying it's identical, but in terms of even rough equivalency the proportionate fault issue would have to be determined by the same trier of fact that's determining our liability, if any. So it would have to run together if it's going to be like that. That's not provided for. And again if you go to the Eichenholtz case, it's not a bankruptcy case, but it addresses these issues directly and exactly. The plaintiff can't seek anything more than a proportionate fault judgment and the trial has to proceed together so that if you're going to take it away you've got to provide the equivalent, roughly equivalent benefits. This plan doesn't do it.

I referenced the perversity of the plaintiffs bringing these claims that have been constructed or assigned into various buckets by the DCL people. And again I emphasize the plaintiffs then do better if the proportionate fault plan is not used by the litigation court. They do better. That's a perverse incentive. In addition, the entities that are protected from our contribution claims, not only will they be protected, but they'd be sharing -- they'd be protected against claims from us and they'd be sharing in any recoveries by the litigation trustee or the creditors trustee any recoveries that are made against our group. So as a couple of courts have pointed out in arguments, et cetera, those people then they're protected and they have now an incentive to trash the transaction in which they have -- in which they may have played an integral part.

So for all those reasons this bar order does not work and it renders under 524(e), it can't be approved and as I said none of the things that we would have needed are there. There's not an injunction against the plaintiffs. There's not retained jurisdiction over all the plaintiffs and any other entities suing us. So for all those reasons, Your Honor, we object to the plan because the bar order does not work and cannot be used. Thank you.

THE COURT: Thank you.

MS. STEEGE: Good afternoon again, Catherine Steege. We simply join in the argument that was made by the directors and officers.

THE COURT: Thank you.

MR. PACHULSKI: Excuse me, Your Honor.

THE COURT: Yes.

MR. PACHULSKI: Hi. This is Isaac Pachulski of Stutman, Treister, and Glatt for Brigade Capital Management and I'm -- I've been following with the agenda and I think Brigade is next, but I'm not sure. I apologize. I don't intend to preempt anybody else, but if I am next I just wanted you to know I'm here sort of.

(Laughter)

THE COURT: Thank you, Mr. Pachulski. Hold on just one moment.

MR. HANNAFAN: Good day, Your Honor. Blake Hannafan of Hannafan & Hannafan on behalf of Timothy Knight. We had joined in the objection of the certain officers and directors and we again, Your Honor, just join and adopt the arguments of Mr. McCambridge.

THE COURT: Thank you.

MR. HANNAFAN: Thank you.

THE COURT: All right. I think we now are ready for Brigade.

MR. RILEY: No, Your Honor.

THE COURT: Oh, I'm sorry.

MR. PACHULSKI: Thank you, Your Honor. Again for the record Isaac Pachulski --

THE COURT: No, Mr. Pachulski --

MR. PACHULSKI: -- of Stutman, Treister, and Glatt professional corporation.

THE COURT: I'm sorry. There is one more. Please pause for another moment. Forgive me.

MR. PACHULSKI: Happy to.

MR. RILEY: Your Honor, Richard Riley from Duane Morris on behalf of the foundations. Your Honor, with me today is David Bohan from the Katten Muchin firm. And I don't know if we have filed pro-hoc papers, but I'd ask that he'd be heard today and I'll follow up with pro-hoc papers.

THE COURT: Very well. Thank you.

MR. BOHAN: Thank you for hearing me, Your Honor. I'm here this afternoon on behalf of the Robert McCormick Foundation and the Cantigny Foundation. Your Honor, we have joined in the objections to the DCL plan that have been filed by certain officers and directors and I also adopt the comments that were made this afternoon by Mr. McCambridge. We agree that the bar order is over broad and that in exchange for -- that the conferring on the non-settling defendants of a speculative, hypothetical, and potentially unenforceable judgment reduction provision sometime in the

future is not fair and adequate compensation for the certainty and the immediacy of the forced taking of our contribution and indemnity rights by virtue of the confirmation of this plan.

Your Honor, I won't repeat everything that's been said, but I do note that the contribution bar order has been defended on the grounds that it's necessary to bring about a final peace, the certainty that the settling defendants will know what their maximum liability has been. In the DCL plan memorandum, for example, the plan proponents state that settling defendants are entitled to the benefit of their bargain, namely that they cannot be held liable on account of the settled claims beyond the consideration that was already paid pursuant to the settlement. That's all well and good, Your Honor, but the bar order in this case goes far, far beyond that and is completely unnecessary. It is a difficult document to parse, but if I understand it correctly, Your Honor, it would preclude -- it would not preclude, for example, released parties from initiating contribution claims of their own against other than released parties. In other words, the beneficiaries of the bar order themselves I believe have preserved their own rights to bring contribution claims against parties like my clients, the foundations. And that's completely unnecessary. Unless the Court has any questions --

THE COURT: I do not.

MR. BOHAN: All right. Thank you, Your Honor.

MR. PACHULSKI: May I proceed, Your Honor?

THE COURT: Not yet.

(Laughter)

MR. PACHULSKI: Thank you.

MR. LOIZIDES: Your Honor, Chris Loizides. I'm just here as local counsel with Mr. Pachulski, who's on the telephone.

THE COURT: Oh, okay.

MR. LOIZIDES: Thank you.

THE COURT: All right. Mr. Pachulski, you may proceed.

MR. PACHULSKI: Thank you, Your Honor. For the record, Isaac Pachulski of Stutman, Treister & Glatt appearing for Brigade Capital Management.

Our objection to the bar order is very limited and it's very different from what Your Honor's heard thus far. Our objection is to that portion of the judgment reduction provision which is the second paragraph of the proposed order that would purport to apply judgment reduction to claims that the estate does not own and has admitted that it does not own and that the estate cannot release and that the estate has admitted it can't release, namely the individual creditors state law fraudulent

conveyance, constructive fraudulent conveyance claims that Your Honor has heard so much about. And the fact is there is simply no precedent, no reported decision that permits the imposition of involuntary judgment reduction on anyone other than a settling plaintiff.

Now I'd like to put this argument in context with a couple of preliminary observations, Your Honor. First, from the time that we filed our objection where we spent a great deal of time talking about these individual creditor claims, we've had two concerns. One is that the distinction between the estate claims and the individual creditor claims be recognized and that they not be conflated. And second, that the plan not advertently or inadvertently release the individual plans that the estate doesn't own. And between the time of the objection and today there have been prior iterations of the plan. And we've actually corresponded with the debtors on this. And with the exception of this issue, they management to resolve our other concerns on this point of avoiding the conflation and avoiding the relief, but this issue remains outstanding.

The second point that I think is critical to understand and is contrary to what you've heard thus far is that if you didn't have the second paragraph, you didn't have the judgment reduction, there is already a judgment reduction resulting from this settlement.

Now this settlement if it's approved by the Court and if the Court finds that it's fair and equitable, will result in a dollar for dollar judgment reduction because at least in the context of a fraudulent conveyance claim and I can't speak to other types of tort claims, if for example, somebody with a $100 claim gets a $30 distribution as a result of a settlement, there's already a judgment reduction because inter fraudulent conveyance claim, you can't seek more than your claim.

So to the extent that there are distributions resulting from this settlement, that will automatically reduce without anything and this will true in any Court whoever decides fraudulent conveyance, there will be a dollar for dollar reduction for what the case law refers to as the pro tanto reduction.

The issue here is here is different because the proposal goes beyond that and would impose what's called a proportionate reduction. So that would mean that if a Court decides that the settling banks were liable to the selling stockholders, then it would take the judgment that the senior noteholders would have gotten, multiply that by the bank's proportionate liability, and reduce the judgment by that amount.

As applied in this case to parties who are not settling plaintiffs, this has two perverse and in at least

one case, bizarre results. The first is that the reduction in our judgment, the senior noteholders judgment, could far exceed anything we get under the settlement. For example, and this is just a hypothetical, it's not in the evidence, if there's a $1.5 billion judgment against selling stock -- against to Step 2 selling stockholders and a Court subsequently finds that actually the banks were also at fault, the banks were really liable and that their share is 50 percent, out judgment goes down $750 million. And no matter how you slice the numbers, we're not getting $750 million out of the settlement. But beyond that, it places us in an impossible position. We're going to have to -- to protect our judgment against selling stockholders, we're going to have to argue that the banks weren't liable.

Now I'd ask the Court to consider how bizarre that is in light of what you've heard for months in this case, including over twelve days of trial. After having argued vociferously that the banks were liable because we think the banks are liable, we're now going to have to say no, we were only kidding, they're really not liable and it's all your fault.

But whether or not those are fair or appropriate results, they're illegal results because the application of judgment reduction to someone who's not a settling plaintiff and not a debtor as distinguished from the estate claims

which are not the subject of this argument which raise different issues is an illegal third party release. And although the debtors, the plan proponents cite various bar order and judgment reduction cases at Pages 111 through 117 of their brief, there is not a single case, they cite not a single reported case where judgment reduction has been involuntarily imposed on anyone other than a plaintiff. What happens is if a plaintiff wants the settlement and the plaintiff wants to bar order, the plaintiff who wants the settlement has to subject himself to judgment reduction.

Now the debtors and the plan proponents have asked this Court to consider the confirmation order in *Lyondell* where judgment reduction was apparently applied to a creditor trust. And here I'd actually like to echo something that one of the counsel for the plan proponents pointed out early on in arguing about the indemnities with respect to Zell. Counsel pointed that a confirmation order which is not the result of any reported opinion and which had -- does not explain the reasoning for the decision, should be discounted. In fact, I agree, except it shouldn't be considered at all. It's a confirmation order. We don't know if anybody objected. While there is a vague reference in this confirmation order to any objections being overruled, that's boilerplate language. We don't know who objected or why. So the fact that in some other Court where

the issue was not litigated might have decided this was appropriate is meaningless.

I would also add that if you were going to assess the *Lyondell* decision, while they did have a creditors' trust, from what little I've seen, it appears that they kind of conflated the estate claims and creditor claims and they treated this as an abandonment and a reversion which with all due respect is analytically incorrect. These aren't estate claims and shouldn't have been treated as such.

So that there really is no authority for what they proposed to do. And I'd like the Court to consider the following hypothetical so the Court will understand they couldn't even do this outside the Bankruptcy Court. Suppose you have two plaintiffs and they were both injured in the same car accident and they're each suing two defendants. And one of the plaintiffs decides they want to settle with one of the defendants. So the settling plaintiff settles with on defendant and wants to get a bar order. No case that holds that the, excuse me, that the non-settling plaintiff can be forced to undergo a judgment reduction so that the settling plaintiff can get the bar order. But that's exactly what they're trying to do here.

Beyond that, Your Honor, if you were to decide that on some basis that you can impose a judgment reduction on the individual creditors, they should be limited to a

dollar for dollar pro tanto reduction. To begin with, there is precedent for such a limited reduction in one of the cases that the DCL plan proponents cite. It's the *Munford* case out of the Eleventh Circuit. And in that case, over the objection of non-settling defendants, the Court affirmed a judgment reduction that was limited to dollar for dollar.

But beyond that, there are two important reasons that that limitation is appropriate here. First, you're not dealing with a settling plaintiff. Second, to approve the settlement at all, the Court is going to have to decide that it's fair and equitable and that the banks are paying a reasonable amount. And third, and this is a point that's indicated in the *Eichenholtz* case out of the Third Circuit which was actually cited by someone else in a different context. The Court there explained that when you apply apportionate judgment reduction to a plaintiff, the risk of a bad settlement falls with the plaintiff. In other words, if the plaintiff settles a $100 case against one defendant for $30 and the proportionate liability of that defendant was really $50, the burden of that settlement falls on the plaintiff who settled and that makes sense where a plaintiff decides to settle. But by definition, we haven't decided to settle and so that construct is wholly inappropriate.

And again, this is a fallback, Your Honor. With respect, I don't think there's any basis to impose judgment

reduction on plaintiff, but if you do, it should be limited to what is already going to happen anyway by operation of law which is the judgment reduction should be limited to the amount of the settlement proceeds that are applied to the payment of the debt that's the subject of any fraudulent conveyance action. And with that, I'd conclude my remarks on this point.

THE COURT: Thank you.

MR. GOLDEN: Good afternoon, Your Honor. Daniel Golden, Akin, Gump, Strauss, Hauer & Feld, counsel for the Aurelius and the noteholder plan proponents.

Your Honor, I don't rise to lodge an objection in general to the bar order. We do, in fact, object globally to the bar order as set forth in our confirmation objection. But understanding the rules of the game, because much of the global nature of the bar order will be dependent upon Your Honor's ultimate determination as to the reasonableness of the settlement, we have determined that we're not going to press the global nature of our objection to the bar order until closing arguments because it will involve getting into the evidence.

With respect to the specific point and just so that Your Honor knows, I have informed the other side that we were going to wait to the closing arguments to object to the global nature of the bar order, but did indicate that we

were going to object and it will be our turn tomorrow. But we rise to -- our objection will be limited to the application of the bar order as it relates to disclaim state law fraudulent conveyance claims, the issue that Mr. Pachulski just discussed with the Court. So really this is just an indication that our turn on that issue will come tomorrow. I thought Mr. Pachulski handled it exceedingly well. We may have very little to add to that point, but I didn't want to -- I wanted the Court to know what the noteholder plan proponents' position was with respect to these issues.

THE COURT: It's the noteholders' placeholder.

(Laughter)

THE COURT: Thank you, Mr. Golden.

MR. MOSKOWITZ: Your Honor, good afternoon. Elliot Moskowitz representing JP Morgan Chase.

I actually just have a minor objection to Mr. Golden's placeholder. I think that if the arguments that he's going to raise tomorrow are going to be I think as he conceded essentially duplicative of Mr. Pachulski's arguments or certainly deeply related to Mr. Pachulski's arguments with respect to the disclaim state law avoidance claims, why doesn't he do that -- why doesn't he put those arguments out right now and this way we can in an organized way respond to all of the legal arguments with respect to

the bar order in one shot. I think it makes for not the greatest presentation for these arguments to have been made by others and by Mr. Pachulski and then us to respond and then tomorrow Mr. Golden makes the same, essentially the same argument, perhaps exactly the same argument that Mr. Pachulski made and then we have to respond again or respond differently. I just don't think that makes good sense.

THE COURT: Okay. Before my head explodes, I'll just say no.

(Laughter)

MR. MOSKOWITZ: Very well, Your Honor.

THE COURT: Thank you.

(Laughter)

MR. MOSKOWITZ: So, Your Honor, I do rise to respond to the arguments that have been made today in connection with the bar order or the contribution bar that's contained in the DCL plan. I think the most helpful way for me to organize my remarks at the Court's discretion is to first address the arguments that have been made by I guess the directors and officers which I think go to the bar order generally and to bar orders generally. Then to spend a little bit of time going through the more specific comments they had about the bar order that don't challenge bar orders generally, but challenge some of the specific provisions of this particular bar order. And then to conclude by

addressing some of the comments that Mr. Pachulski made with respect to the disclaim state law causes of action in particular which I understood to be the core of his argument and objection with respect to the bar order.

The director and officer defendants and all of those joining their arguments, but apparently not Brigade, appear to argue that a bar order is essentially in all cases inappropriate. And we think that is simply wrong. Case after case, including the Third Circuit itself in the *Eichenholtz* decision, but also in the bankruptcy context including a decision by Judge Shannon just a few months ago in *in re: Semcrude*, a decision that you've heard nobody talk about so far and that is featured in none of the papers except for our papers. Those cases have fully endorsed the concept of a contribution bar just like the one that we have over here. And as I'll describe more fully in a couple of minutes, I want to be very clear about something because there's been I think a lot of confusion today about this.

A bar order is not a third party release, it is something different than that. It is a tool the Courts have endorsed to encourage a settlement in multiparty cases to ensure that a settling defendant doesn't have to pay twice for the same liability, first by paying consideration in the settlement and then again for contribution joint liability in respect of that same liability.

Let me begin with the case law itself because I think it's important to study the leading cases, especially the two most leading ones from this jurisdiction. The leading case on this topic in this circuit and hopefully there's no debate about this is the *Eichenholtz case, 52 F.3rd 478, Third Circuit 1995.*

In *Eichenholtz*, the plaintiff reached a settlement of a securities class action lawsuit with some, but not all of the defendants. The settlement agreement included a bar order which barred the non-settling defendants from asserting a contribution claim against the settling defendants just like the contribution bar does here. This provision was challenged by the plaintiff.

The District Court approved the bar order and then the Third Circuit approved the bar order as well. The Court reasoned that bar orders are necessary tools to facilitate partial settlements in cases with multiple defendants and they should be endorsed. And that's worth quoting from the Third Circuit's own words and I'll just do that briefly. And I'm quoting from the *Eichenholtz* decision at Page 486. "In general, the settlement of complex litigation before trial is favored by the Federal Courts. However, in multiparty litigation, settlement may be difficult. Defendants who are willing to settle by little peace through settlement unless they are assured that they

will be protected against co-defendants efforts to shift their losses through cross claims for indemnity, contribution, and other causes related to the underlying litigation. Therefore, in cases involving multiple defendants, a right to contribution inhibits partial settlement. Therefore, in order to encourage settlement in these cases, modern settlements increasingly incorporate settlement bar orders into partial settlements."

And the Third Circuit went on to say that the bar order must include a judgment reduction component so that the non-settling defendant is not prejudice by being barred from bringing the contribution claim that that defendant would ordinarily have.

In other words, instead of bringing the contribution claim, the non-settling defendant gets the same benefit by getting its judgment reduced by the amount that it would have received had it asserted a contribution claim. And the Third Circuit in *Eichenholtz* again, expressly agreed that "Proportionate judgment reduction is the fairest method and the non-settling defendants will not be prejudiced by a proportionate fault reduction." And that's at Pages 486 and 487.

And just to go slightly out of order, Mr. Pachulski criticized the proportionate fault reduction formula that is set forth in the bar order in our case. I

don't particularly have a dog in that fight other than to say that we are in the Third Circuit and we have clear Third Circuit case law saying that among the different ways you can calculate the reduction, the proportionate fault is the best way -- is the most fair way to do it quoting from the Third Circuit directly.

And so, Your Honor, that is, in fact, what we have in this case, a partial settlement of a litigation with multiple defendants with some defendants are settling, some defendants are not settling, and a bar order that prevents those non-settling defendants from suing for contribution, but at the same time granting them judgment reduction through a proportionate fault formula as was the case in *Eichenholtz.* But let me not stop with *Eichenholtz.* This is true also in the bankruptcy context. And I think that the most important precedent or an extremely precedent is Judge Shannon's recent, very recent decision in *in re: Semcrude, 210 Banker Lexus 4160, Bankruptcy Court, District of Delaware, November 19, 2010* which nobody has discussed.

In *Semcrude*, a settlement was reached by the parties and was conditioned in part on the entry of a contribution bar discharging individual defendants "from all liability to any other person for contribution or indemnity relating to the released claims." The settlement also contained a provision preserving judgment reduction rights

of the non-settling defendants as well.

A non-settling party objected to the settlement on the grounds that the contribution bar didn't comport with that individual's due process rights. Similar in some respects to the objections that are being lodged by the director and officer defendants here. Judge Shannon soundly rejected this objection and approved the bar order at issue. He held among other things, that the bar order was not prejudicial to the non-settling party because that party was still permitted to take the judgment credit corresponding to what that party would have gotten though the contribution claim. And in the process, Judge Shannon cited approvingly to the *Eichenholtz* decision and stated that "Courts in similar proceedings routinely approve contribution bars." And again, as I said, quoted approvingly from *Eichenholtz*.

I'm not going to go through a whole laundry list of cases. The other cases are set forth in our brief. I will make passing reference to the Third Circuit's decision in *Nutraquest* as well which is supportive of a bar order and that, too, was also in the Third Circuit sitting in appeal on the Bankruptcy Court's ruling below *434 F.3rd 639.*

And let me conclude this portion of my argument by saying that it's not just a matter of judicial invention, there are many states that have similar provisions, both Illinois and Delaware also have judgment reduction

provisions, contribution bars that come with judgment reduction provisions as well, although in the *Eichenholtz* decision -- I guess in response to some of the comments that were made as to why don't you just -- why don't we just forget about this whole thing and just rely on whatever rights people may have under state law, *Eichenholtz* counsels against that and says that it is desirable to fashion a federal doctrine with respect to contribution bars and not simply to revert to whatever state law people have because that would encourage possibly foreign shopping.

So I think that these cases are important. I think they sort of set out the lay of the land with respect to the use of contribution bars in complex cases involving partial settlement.

Now to respond to the points that have been made repeatedly about the contribution bar constituting a third party release and we've heard quotations from *Spansion* of course and we've heard quotations from *Continental*. I want to be very clear about this. The parties have gotten -- the parties that are least calling the entirety of the bar order as third party release, have gotten it wrong. And the fact that they've tried to analyze the bar order under the factors that you typically would use to analyze a non-consensual third party release are not appropriate for purposes of this analysis.

(Telephone recording interruption)
(Laughter)
MR. PACHULSKI: Hello?
MR. MOSKOWITZ: There's plenty of activity.
(Laughter)
THE COURT: Is the Court Call Operator on the line?
COURT CALL OPERATOR: Yes, Your Honor, I'm here.
THE COURT: All right. Have we fixed the problem with that one line?
COURT CALL OPERATOR: I did. I fixed the problem.
THE COURT: Thank you.
COURT CALL OPERATOR: You're welcome.
THE COURT: You may proceed.
MR. MOSKOWITZ: Thank you, Your Honor. To be very clear about this, the bar order only prevents non-settling defendants, non-released parties from bringing contribution and indemnity claims against released parties for barred claims. And we've amended the bar order in response to the objections that have been filed to make it crystal clear that it has nothing to do with third party claims. And I'm quoting now, quote -- this is a quote from the bar order, "Order that nothing herein shall prejudice or operate to preclude the rights of any barred person to

assert any claims or causes of action, including without limitation any direct or personal claims or causes of actions other than claims for non-contractual indemnity or contribution against any released party as set forth above."

We've tried to make it crystal clear that all we are talking about here is liability for contribution claims so that we don't pay twice; one in the settlement and then once again in respect of that same liability if a Court finds that we're jointly liable with a non-settling defendant.

Let me move now to the what I will call the procedural fairness arguments that have been made, principally by the director and officer defendants. I think their main concern that they articulated to you, Your Honor is that the bar -- there's a concern, I guess that down the line there will be another Court out there that will disregard the injunctions of -- the rulings of this Court and will simply fail to apply the bar order. Or I guess a corollary concern, the parties in that case will fail to adhere to this Court's instructions with respect to the bar order. And the question is, you know, what happens then?

I think the first thing I'd like to say is that I mean bar orders happen all the time and this concern probably is relates to not just this bar order, but it would relate to any bar order. And the truth is that there's I

think -- and frankly, even outside the bar order context, there should be presumption that other Court in the United States will follow the directives of a properly issued order of another Court, full faith in credit, et cetera.

So I think that, you know, the concern about another Court not following the order of this Court is probably a remote proposition. But for the avoidance of all doubt, the amended bar order clarifies that the Bankruptcy Court retains continuing jurisdiction with respect to all matters concerning the bar order, expressly including matters related to the enforcement of the bar order.

And I think that it's not controversial proposition to say that a Bankruptcy Court can retain jurisdiction with respect to all manner of orders, but even with respect specifically to a bar order, that has been done time and time again. Judge Shannon did it in the *in re: Semcrude* case. It was done in *Lyondell*. Judge Gerber retained jurisdiction there as well in case there were any issues down the line with respect to the bar order. It's done -- it was done in the *MTC Technologies* shareholder litigation in the Eastern District of New York in 2005. Done in that bar order. It was done in the *Enron* case. Courts routinely retain jurisdiction of -- over all manner of orders, but also including specifically over a bar order.

I submit that that is a pretty substantial

protection that is available to the non-settling defendants should something go wrong. And I would also say that what I will just call the penalty provisions that the director and officer defendants wanted to add to the bar order, while I may not have a dog in that fight, that seems to be a provision that you would -- provisions that were suggested are not found in any bar order and I think it would be offensive to whoever is pursuing those claims going forward.

THE COURT: You would agree though, would you not, that a provision that -- well a retention of jurisdiction provision in an order doesn't necessarily mean that a Bankruptcy Court at any given point in time post confirmation, in fact, would have jurisdiction, does it?

MR. MOSKOWITZ: I agree with that. Obviously, the Court can only retain jurisdiction as to matters for which it can retain jurisdiction.

THE COURT: Well, my point is, you know, at the point of confirmation, the Court may have jurisdiction. Two months after it may have jurisdiction. And a year later it may not, depending upon the circumstances.

MR. MOSKOWITZ: Understood, Your Honor, but specifically in response to that point, I would refer Your Honor to the *Travelers Indemnity Company v. Pearlie Bailey* case coming out of the Supreme Court in 2009, *129 S Court 2195, 2009*, in which the Supreme Court approved the

Bankruptcy Court's decision to enjoin State Court lawsuits filed ten years after the approval of a plan of reorganization in light of settlement orders that were issued years prior.

And the Court, the Supreme Court there stated "The Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders. What is more when the Bankruptcy Court issued its prior order, it explicitly retained jurisdiction to enforce it." That doesn't sway entirely Your Honor's concerns, but all I'm saying is that it is standard for Bankruptcy Courts to retain jurisdiction going on quite a ways into the future.

THE COURT: Oh, I know.

(Laughter)

MR. MOSKOWITZ: Okay. Moving on, Your Honor, to some of the points that Mr. Pachulski made. I guess I sort of -- there was a dissonance between Mr. Pachulski's initial remark and frankly, my conversations with him privately and what he presented to the Court. I mean, I think it is the case that he has an issue with the bar order with respect to one particular point of it and that's with respect to the treatment of the disclaimed state law avoidance claims. He mentioned a few other things in the course of his presentation, but I think at its core, and he's filed no pleading on this. Certainly though at its core in our

discussions and I think it's not, probably not disputed that on the whole, other than the evidentiary objections that the noteholders will present in closing, that Mr. Pachulski's issue with the bar order is limited to the treatment if disclaimed state law avoidance claims under the bar order.

So let me just talk about that for just a minute or two. Consistent with other changes in the DCL plan, the bar order has been amended to reflect the fact that state law constructive fraud claims versus shareholders which we call the disclaim state law avoidance claims are not released by the DCL plan. Accordingly, the bar order now expressly states "Bar claims shall not include any claim for non-contractual indemnity or contribution against any released party solely in its capacity, if any, as a selling shareholder."

So just to be clear about what this means. If a selling stockholder gets sued and then wants to sue another stockholder for contribution in that parties capacity as a stockholder, the selling stockholder can do that under our bar order. It does not -- that action, that claim for contribution is not restrained even for released parties who have settled all other claims against them.

But I think what Mr. Pachulski and perhaps others are arguing is that this is not enough. This carve out, if you will, is not enough. In their view, in Mr. Pachulski's

view, the bar order should not apply in an action asserting a disclaim state law avoidance claim under any circumstances.

In other words, they're arguing that if they bring a constructive fraud claim against a shareholder, than that shareholder should be able to claim over against a release party for contribution not only in that parties capacity as a selling stockholder for which liability has not been released and we concede that such a lawsuit is not precluded by the bar order, but even on account of liability for which the released party already paid to settle under the plan and we disagree with that view and let me just flesh it out for another moment.

By failing to assert a very narrow universe of claims, in other words, the state law constructive fraud claims against the shareholders, that's the only thing that's been disclaimed under the plan, those narrow claims reverted to or are in the hands of, use whatever term, to individual creditors. But only those claims are in the hands of individual creditors, nothing more than that. State law constructive fraud claims against the lenders in their lender capacities were asserted by the estate under 544(b) on behalf of all creditors and are proposed to be released under this plan in exchange for the consideration that we're providing under the settlement.

And obviously, it's hotly debated as to whether that consideration is enough, is adequate for the claims that are being released. But the bottom line is the estate had the authority to assert those claims and it exercised that authority with respect to our lender capacity and those claims are proposed to be settled under the DCL plan for the settlement consideration that's being paid.

Brigade would have no right to bring those settled claims directly against the released parties. And, therefore, should have no right to recover indirectly on account of any contribution claims in respect of that same form of liability. In other words, what I think that Brigade is arguing and they may not be doing this intentionally, but what I think Brigade is arguing is that they should have the right to do indirectly what they cannot do directly. They want to be able to sue a shareholder and then allow that shareholder to sue a lender in its capacity as a lender for contribution even though that lender has already paid for a release in respect of its lender liability on state law avoidance claims against -- that were asserted against the lenders. And that we would suggest would permit a classic double recovery for Brigade or for anyone asserting those claims. They would be recovering once on the part of the settlement.

Let's not forget that Brigade is getting recovery

as part of our settlement. They debate that it's enough, but they are getting a recovery under our settlement. And then we would pay them again in our capacity as a lender through the exercise of the contribution claims. We would pay the defendant who is asserting the contribution claim against us and then those funds would be used to satisfy the judgment against that non-settling defendant. And so we believe it would be two recoveries and that and only that is the aim that the DCL plan and the bar order in it is trying to frustrate.

Again, we have amended the DCL plan to make clear that the bar order does not protect a release party in the event a contribution claim is brought against it solely in its capacity as a selling stockholder. And that is because seeing shareholders were not released under the plan. So to the extent we're also a selling shareholder, we didn't pay for a release in that capacity and we're not entitled to the protections of the bar order in that capacity. But where we've paid for a release such as JP Morgan in connection with its lender capacity, we should not continue to face exposure in our lender capacity of those state law claims when they were held by the estate were settled for a consideration and that -- then the adequacy of which is before the Court, but that is part of the proposed settlement.

MR. PACHULSKI: Your Honor?

THE COURT: Mr. Pachulski, if you've been listening, what I've been doing is not hearing rebuttals but --

MR. PACHULSKI: It's just -- I want to clarify something because most of this argument was responding to an argument that I didn't make. And so my position hasn't -- I don't intend to go through a full rebuttal. All I'd like to do is clarify my position because it seems to have been misunderstood.

THE COURT: Well let's wait until Mr. Moskowitz is done.

MR. PACHULSKI: Okay. I'm sorry, I thought he was done.

THE COURT: He was just taking a breath.

(Laughter)

MR. MOSKOWITZ: I'm nearly done, Your Honor, actually. Let me just review my notes, but while I review my notes, I would suggest that an exception not be made with respect to Mr. Pachulski and -- because if you're going to allow rebuttals in one case, we should allow them in all.

MR. PACHULSKI: So if someone misstates my position, I can't respond?

THE COURT: Just wait a minute, Mr. Pachulski.

MR. PACHULSKI: All right.

THE COURT: Until Mr. Moskowitz tells me he's done.

MR. MOSKOWITZ: Okay. That's all I have for now, Your Honor.

THE COURT: All right, thank you. Mr. Pachulski, you may have two minutes.

MR. PACHULSKI: Just to clarify, we have never taken the position that as one way or the other as to whether a bar order can or cannot be entered between settling defendants and non-settling defendants. We don't have a dog in that fight. Our position was -- simply had to do with the application of the judgment reduction provisions to our claims as plaintiffs. So as far as whether one -- a settling defendant can sue a non-settling defendant or not, we've never -- we don't have a position one way or the other on that. And our sole objection is limited to the application of the judgment reduction provisions, not the bar order, but the judgment reduction provisions to the claims that are not owned by the estate. That's it.

THE COURT: Thank you.

MR. STEEN: Good afternoon, Your Honor. Jeffrey Steen, Sidley Austin on behalf of the debtors.

And the let the record reflect that the fact that I had to practically climb over three or four of my colleagues to take the podium says nothing about the

popularity of this provision. But in light of the vigor of the objections --

THE COURT: I'm sure the fee applications will reflect that as well.

(Laughter)

MR. STEEN: Thank you, Your Honor. In light of the vigor of some the objections that have been raised to the bar order today, and in particular, the focus of Brigade's objection, we thought it would be useful to the Court to briefly supplement the remarks of Mr. Moskowitz to flesh out the debtors' perspective on this provision.

And, Your Honor, what I'd like to do is direct the Court's attention to the third decretial paragraph of Section 11.3. And it's actually on Page 88 of the second modified DCL plan that was lodged with the Court on April 5. And that provision, Your Honor, that paragraph is very brief, but that basically contains a number of restrictions and limitations that we think are very important and we think have a direct bearing, if not dispositive bearing on the objection raised by Brigade and others. Does Your Honor have a copy of that plan?

THE COURT: I do.

MR. STEEN: Oh, thank you very much. In particular, Judge, we think that the exclusions in the third decretial paragraph of Section 11.3 protect any individual

creditors who may bring any disclaimed state law constructive fraudulent transfer claims or any selling shareholders that may be defendants in any of those disclaim causes of action. And we'd like to briefly highlight two points.

First, by its terms, Section 11.3 and Mr. Moskowitz actually made this clear, but if we take a look at the first sentence of the third decretial paragraph on Page 88 of the plan, Section 11.3 applies by its terms only to claims of contribution or non-contractual indemnity. And so to use a specific example, if any non-settling defendant such as a selling Step 1 or Step 2 shareholder is sued on account of the pre-petition leveraged buyout and that defendant has any claim over against any released party that is a direct claim or that is a non-derivative claim or that is a personal cause of action that does not sound in contribution or non-contractual indemnity, than that claim is preserved and it's not subject to the provisions of the bar order and it's not subject to the judgment reduction provisions in that bar order.

And so specifically, it's our view, Your Honor, the company's view, that with respect to state law constructive fraudulent conveyance claims of the type that are the basis of Brigade's objection, the law is pretty clear that those claims do not give rise to contribution

claims. And there are several cases that hold this, Your Honor. I'm just going to mention a couple. The leading case is out of Tribune's neck of the woods, out of the Northern District of Illinois, it's the *Wiebolt's* opinion which is reported at *111 Bankruptcy Reporter 162*. That's a decision by the Judge, District Judge Holderman in 1990. And more recently, Judge Shannon in 2009 issued a similar holding in the *Amp'd Mobile* decision which is reported at *404 Bankruptcy Reporter 118.*

And those decisions are well reasoned and they make sense. And they hold that in contrast to tort claims, the legislative theory animating fraudulent transfer law is cancellation or avoidance of the challenged transfer. In other words, the nature of the relief sought is recessionary. It's not the imposition of liability for money damages based upon the consequences of a wrongful act or tort which as we know is the basis of tort law. And so those cases and many cases cited by those decisions in law review articles conclude that constructive fraudulent transfer claims brought under the UFTA, the UFCA, or state law do not give rise to contribution or non-contractual indemnity.

And so our view, Your Honor, on behalf of the company is that even if this Court has jurisdiction to enter the bar order with respect to disclaimed state law

constructive fraudulent transfer claims, that as a practical matter, the terms of this bar order would not apply to those claims and would not prejudice the rights of either the plaintiffs, the individual creditors asserting those claims, or any of the selling shareholder defendants under those claims.

I have one more point, Your Honor. If we look back at this third decretial paragraph, Clause 2 in the second sentence makes clear that the bar order by its terms does not apply to any claim or any cross claim or any third party claim for which there's no joint liability as between the non-settling defendant on the one hand and the release party on the other hand. Now as I said, this exclusion is made clear in Clause 2 of the third decretial paragraph of Section 11.3 in that provision and that exclusion has been in the bar order since last October.

Now we do not believe, Your Honor, for the same reason I just discussed with respect to the first point about contribution claims that under applicable non-bankruptcy law, any of the disclaimed state law constructive transfer claims would give rise to joint liability as between the selling shareholders, the selling Step 1 or Step 2 shareholders on the one hand and any of the parties that paid considerable consideration to settle their claims under the DCL plan. And those claims simply do not sound in tort.

They do not give rise to money damages for which multiple tort-feasers can be found jointly liable. And, therefore, it our view that under the four corners of the bar order as proposed in the DCL plan, the judgment reduction provisions in that order would not apply to those kinds of claims.

Our analysis, Your Honor, of the counts, the multiple counts and causes of actions, the avoidance claims that were actually brought by the committee on behalf of the estate in December of last year before the expiry of the statute of limitations, we would apply a similar analysis and focus on whether those claims would give rise to contribution claims under non-bankruptcy law and whether those types of claims would give rise to joint liability. And without going through the litany of all those claims and causes of action, we can tell Your Honor that on behalf of the company, it's our conclusion that many, if not most of the counts and claims in the community complaint for similar reasons would fall within one of these exclusions, the joint liability or non-contribution and non-indemnity exclusion in Section 11.3.

And, Your Honor, unless you have any additional questions, I'm glad to yield the podium.

THE COURT: I do not.

MR. STEEN: Thank you.

THE COURT: Are we ready to move on to Wilmington

Trust?

MR. STARK: Your Honor, I'm bringing my bottle of water, but I know Your Honor's rule about that if I --

THE COURT: The only rule is don't spill it.

(Laughter)

MR. STARK: If I spill it, I buy you a new podium. I think we've had this colloquy before. Give me a minute.

For the record, Robert Stark from Brown Rudnick on behalf of Wilmington Trust, the successor indenture trustee for the PHONES.

Now, Your Honor, this is the time to talk about PHONES' specific legal issues. And I appreciate this opportunity. Your Honor's tired, you've heard a lot and I'm not going to abuse it. Also, we do fold in with the Akin Gump team and the co-plan proponents and their leadership in the collective arguments and I'm not going to be reiterating or advance previewing any of them for you. I'm sensitive to Your Honor's needs in that regard.

Furthermore, the DCL plaintiffs and, excuse me, the DCL plan proponents in their amendments obviated one of my issues. They've clarified that Wilmington Trust's claims for its own fees and professional costs is not apparent -- is now a parent level general unsecured claim and not a subordinated PHONES claim so we have one issue left to talk

about.

And two of the other objections that were raised or points that were raised in my objection are indeed factual in nature and acknowledge it as such and should be a closing when we talk about evidence. And that's whether depending upon the valuation, enterprise valuation, trade is receiving an appropriately better treatment than the PHONES holders. It does invoke contractual subordination issues, but it's really a valuation issue.

And second, whether the banks can enjoy contractual subordination under the terms of our indenture when evidence shows a lack of good faith in the transactions that they hereby assert in their claims. So we'll defer those arguments again for another day. That leaves us with two arguments, Your Honor. And sadly, they are meaty ones and they're a little involved, but I'll try to be engaging as I can.

THE COURT: Oh, you’re always engaging, Mr. Stark.

MR. STARK: Good. I’m glad to hear that. Thank you, Your Honor.

The first is does the DCL plan architecture properly invoke the contractual subordination provisions of the PHONES indenture and to walk through that contractual subordination. And the second, does the DCL plan

inappropriately infringe upon our legal rights, Wilmington Trust's legal rights, on behalf of the PHONES noteholders, as a private litigant against non-debtor third parties. And we've heard a little bit about the bar date order. I won't touch upon that too much, but we have some other issues. Let me take each of them in turn.

First, contractual subordination. So what does the plan provide? We do not receive any of the 431 million. The settlement funds that's being reserved exclusively for the senior noteholders, we get exclusively subordinated rights to litigation recoveries through a trust vehicle. There's a fair amount of stacked definitions that ultimately gets you to what the distribution rights are.

I'm happy to walk Your Honor through it, but I think we probably all can -- know what it is and can cut through it. So if you'll allow me to paraphrase it, I'll do my best.

As I see, for the stacked definitions, all the LBO causes of action are put in a trust. Unsecureds get, I believe, the first net 90 million, and then they get 65 percent of the next -- net proceeds thereafter. The banks get the 35 percent net proceeds. The PHONES get a pro rata slice -- pro rata allocation of the unsecured part. But of course, we don't get to keep it.

Section 1.1.44 on page 7, that's the definition

of Class 1J trust interests. It provides -- and again, I'll paraphrase, but we can go through whatever language issues you'd like, Your Honor. The PHONES turn over all such rights of distribution to senior noteholders and anyone else claiming contractual seniority, meaning the banks. And this marries, I guess, with Section 7.15, which states that the DCL plan proponents, it's their intention to honor contractual subordination against the PHONES to the fullest extent possible.

Okay. We understand their deal. But is it right? We don't think so. We don't so absent consent. We've certainly consented to certain treatments in our own plan. That may be somewhat prejudicial in terms of what the arguments are, but it's our plan. And they impose upon us, cram-down-wise, under 1129(b), a form of contractual subordination that we think is inconsistent with our document. We don't think they can.

I ask Your Honor to turn, respectfully, to the indenture itself. It's the exhibit to our objection. If Your Honor doesn't have a copy handy, I'd be happy to give you one.

THE COURT: Well, I'm sure it's up here somewhere, but it would be handier if you could give one to me and to my law clerk.

MR. STARK: Okay. May I approach?

THE COURT: You may. Thank you.

MR. STARK: Now, subordination has its own article. It's Article 14, and the principle provision is 1402, and that's on page 62.

THE COURT: Go ahead.

MR. STARK: Okay. Now, I'll paraphrase it, because it is lengthy. Again, we can read it into the record, but upon distribution of assets of the company in a bankruptcy, a wind-up, or assignment for the benefit of creditors under state law, we have an A and a B. A is senior indebtedness is entitled to full payment before PHONES receive repayment that they're entitled to under Section 3.10 of the indenture, the company's repayment obligations, and B, any distribution "of assets of the company", shall be turned over to holders of senior indebtedness.

The following sections of Article 14 sort of reiterate and follow the same philosophical conceptual architecture. Contractual subordination, and thus distribution turnover, pertains exclusively to distributions of "assets of the company". The company, by the way, is defined on page 1. And on page 1, we see that the company is Tribune Company. It's not its bankruptcy state. It's certainly not its bankruptcy state as it may be augmented by Chapter 5 causes of action or strong-arm rights taken from

creditors and bestowed upon the debtor-in-possession. And that's even though Article 14, all over the place, talks about, extensively, what's supposed to happen in a bankruptcy scenario.

And tellingly, the indenture also contemplates third-party recoveries. If Your Honor will look, please at 5.10 of the indenture. That's on page 32. This is the cumulative remedies provision. And the cumulative remedies provision, like all indenture of cumulative remedy provisions, says, "The indentured trustee, on behalf of the PHONES noteholders, have rights under this indenture. They may be asserted. They may be asserted in bankruptcy. They may be asserted in any sort of non-bankruptcy forum."

THE COURT: Mr. Stark, I'd ask you to pause, because I'm --

MR. STARK: You're not finding it?

THE COURT: I've got page 32.

MR. STARK: Page 34. Excuse me.

THE COURT: I'm sorry. Okay.

MR. STARK: I may have misspoken.

THE COURT: All right. Thank you.

MR. STARK: Okay. "And the indenture trustee has any other rights that may exist in the law or in equity." And that's anyone. So clearly, this contract contemplates trustee recoveries from third parties, but explicitly

provides only for turnover of company assets distributed in a liquidation scenario but not third-party recoveries. Now, if the DCL proponents would concede that the parent level unsecureds are the fulcrum class, and so we're really here discussing about a distribution of enterprise value -- sort of in the form of cash, debt, stock, et cetera -- I'd have little to argue. These are clearly assets of the company, and I'd have to turn them over.

But all the proponents claim -- all the DCL proponents claim is that the banks are the fulcrum, that they are guaranteed claims at the subsidiary, soak up all the value, and if there's nothing really for parent company creditors, but for their settlement that they're willing to give up. And it's settlement with all of the creditor constituencies and the creditors committee and the settlement of their claim exposure. Now, the claims that have been -- that we talk about, some of them may be "assets of the company" but probably not the strong ones, because of in *pari delicto* and other defenses, the powerful claims, so says Mr. Klee [ph], of the creditor claims -- those arising under state law, those that were strong-armed to the debtor, those that now have been reverted back to -- at least in constructive fraudulent conveyance terms -- these pre-LBO creditors, like Wilmington Trust on behalf of the holders. Or they arise under Chapter 5 avoidance theories.

The long -- the law has long held, and Mr. Klee expanded on, at great length in his report, and the 3rd Circuit confirmed in Cybergenics cited in our brief, that strong-arm and Chapter 5 claims do not belong to the company. They belong to creditors. The debtors, and here the official committee, only is given standing to assert them in a trustee capacity on behalf of others, other creditors, but they are not assets of the company. So, some unknown, unquantifiable -- at least by me -- portion of the 431 million that's being given up to senior noteholders on account of the strong Chapter 5 -- the strong strong-arm claims that the estates are asserting but belong to me, some portion of that 431 million does belong to the PHONES noteholders. They're assertable by the trustee, absent a bankruptcy case. And under applicable law, they belong to the creditors. And they're not to be turned over, under my indenture. They are to be delivered to the PHONES noteholders. Again, if we were to consent to a different mechanic, as we have done in our plan, that would be a different story. But it can't be imposed upon us.

Besides the 431 million, the plan architecture is all wrong. Our slice of litigation recoveries are not to be turned over to senior indebtedness. These are third-party recoveries. We are to share in them *pari passu*. So this plan violates our claim rights. It overextends contractual

subordination beyond what the document provides for. I think the rule of explicitness still applies in connection with subordination issues, so it violates our rights under 502(a). It overextends beyond the limitations of 510(a), and thus, the plan violates 1129(a)(1). If the plan violates other provisions of the bankruptcy code, it can't be proposed in good faith. It has to be violative of A(3). Certainly, it violates the best interest test if it takes away my entitlement. And most assuredly, under 1129(b), it's not fair and equitable.

I think that takes me to my second major objection point, Your Honor, and that's does the DCL plan inappropriately infringe on our legal rights as a private litigant against non-debtor third parties. And we think so. There are two lawsuits at issue here. We have our constructive fraudulent conveyance claims against the stockholders, and that's the bar order discussion we had earlier. And we have our separate adversary proceeding against the banks, and we'll talk about them in turn very, very quickly.

I don't want to belabor the point on the bar order, but to the extent we sue shareholders, they sued JPMorgan for contribution indemnity, I fail to see -- and I can't believe I listened to all this conversation but nobody ever addressed it -- how Your Honor has jurisdiction to

impose that kind of fee-sharing arrangement between the shareholder defendants in my litigation versus JPMorgan. They may claim unfairness all over the place. They chose not to settle with us. That's their choice, but Your Honor has marathon limitations. Those don't enable you to enter the bar date that they ask for.

And one further point on that. You can't just sort of call it a settlement and violate the law. The 2nd Circuit dealt with that in Iridium. The law is the law. Calling something a settlement doesn't get you out of it. And if you're going to call it a settlement, I didn't get anything in the settlement. The senior noteholders got all the funding, so for Mr. Moskowitz to come up and say, we bought peace, not with me.

Let me take -- let's take a quick turn to the second lawsuit, Your Honor. Our adversary proceeding against Citicorp and the banks was filed here on March 4, 2010. It's been around for quite a while, and as sort of dropping a footnote for calendar observation purposes, in eight days, Your Honor, it will be the one-year anniversary of Your Honor's order appointing Mr. Klee as examiner. We seem to have learned so much and so little at the same time.

Our lawsuit against Citicorp emanates from the LBO, but it is particular to the PHONES noteholders. It hasn't been before Your Honor in quite a while, not by our

choice, so let me just give you a really quick summation of what it is.

In 2007, Citicorp was the PHONES indenture trustee. In 2007, at the same time it was our indenture trustee, it was a primary advisor to Tribune on the structuring and the architecture of the leverage buyout. The complaint alleges that Citicorp violated duties to the PHONES holders, including especially the duty of loyalty, and that the other banks knew all about this. In fact, it was -- it's all in the report itself. And they aided and abetted that violation. And we sought in that complaint, among other forms of relief, claims disallowance under Section 502(a), and the theory for that was unclean hands, under applicable federal law, and also equitable subordination at the parent company level, pursuant to 510(c).

And I've long wanted to litigate this cause of action. In fact, Your Honor may recall. You and I had a -- kind of a fun colloquy, I was trying to find it just preceding the hearing, where I said, Judge, I really want to litigate this. And you said, nobody ever doubted your eagerness, Mr. Stark. And I also said at that hearing, there'll be a day of reckoning by the decision on this side of aisle for not letting me litigate that.

The 5th Amendment's a pesky thing, Your Honor.

I'm entitled to due process. I'm entitled to due process, even if it's inconvenient for their plan constructs. The Court cannot, consistent with the Constitution, confirm a plan that whisks away my lawsuit, as if it didn't happen, without affording me my day in Court. You cannot do that. And I think that's true, even if they don't think all that much of my lawsuit.

Frankly, I think, going back, again, a year ago, they then didn't think an awful lot about the fraudulent conveyance claim against step two. I expect the usual retort: "Judge, you can't hold up the plan over this lawsuit. It's been sitting." I answer you can, and you must. And frankly, we do it all the time.

Let me tell you what I mean by that. Let's think of a basic, plain vanilla, widget manufacturing debtor. It files for bankruptcy. It files a plan of reorganization, and it's going to convert the unsecured debt into a stock. Simple. Debtor's books and records reflect a $1 billion unsecured aggregate liability amount, but unsecured creditors have filed claims totaling 3 billion. We don't delay confirmation until the claim's disputes are resolved. We don't do claims reconciliation to completion for confirmation and consummation. We exit bankruptcy and we do it in the usual way. We distribute one-third of the stock to the 1 billion in allowed claims, and we reserve two-

thirds of the stock pending litigation outcome or settlement. That's what we do. Everyone gets due process. If the creditors, who have asserted the 2 billion in excess over the books and records, if they don't settle, they get their day in Court. The same for the debtor.

The DCL plan takes this right away from me, because the claims are allowed in a stipulated amount, and the distributions are made for the claims allowance without affording me the opportunity to litigate, notwithstanding the fact that I virtually begged to allow to litigate it.

Your Honor, their plan is inconsistent with the law. It's inconsistent with what we do in bankruptcy. But there's another plan before you that is consistent with the law, and that widget manufacturer's traditional plan of reorganization. That's our plan. Their plan can't be confirmed, Your Honor.

I don't know if you have any questions for me.

THE COURT: I do not. Thank you, Mr. Stark.

MR. JOHNSTON: Your Honor, I'd like to ask for a five-minute recess. Mr. Stark articulated his primary argument, which is nowhere to be found in his brief, and I'd just like to organize my thoughts for a few minutes.

THE COURT: Well, it's about time anyway. We'll take a five-minute break.

MR. JOHNSTON: Thank you.

(Recess at 3:57 p.m. to 4:09 p.m.)

THE CLERK: All rise.

MR. JOHNSTON: Thank you, Your Honor. For the record, again, Jim Johnston of Dewey & LeBoeuf on behalf of Oaktree and Angelo Gordon as proponents or co-proponents of the DCL plan. I appreciate the break, Your Honor, because it allowed me to confirm specifically what I had suspected when I was hearing Mr. Stark's argument, and that is, in fact, that the first argument he laid out for you is nowhere in his brief and, in fact, is a brand-new argument.

The objection by Wilmington Trust is filed at docket 7996, and it lays out four arguments to confirmation of the DCL plan. The second argument previewed in the preliminary statement at paragraph one says that the DCL plan provides the PHONES with a lower recovery than it would receive in a Chapter 7 liquidation by A, subordinating the PHONES to trade indebtedness and retiree claims against Tribune Company and inter-company claims of Tribune subsidiaries. I think we heard Mr. Stark reserve that argument for later advancement. And B, wrongly assuming that the PHONES are subordinated for the purpose of allocating distributions from the creditors trust contained in that plan when the purported payment subordination of the PHONES does not extend to payments from entities other than Tribune Company.

Now, that is related to what Mr. Stark argued today, but it is an argument that was strictly limited to payments from the creditors trust under the DCL plan, which Mr. Stark argued in his objection are not subject to the PHONES subordination provisions. This argument is laid out in section 2 of the brief, starting at paragraph 7, and in particular, paragraphs 11 through 17. The argument concludes, driving home the point that it is strictly limited to distributions from the creditors trust at paragraph 16, where Wilmington Trust concludes: "According, the subordination provisions in the DCL creditors trust agreement does not apply to those holders of the PHONES who purportedly contributed their individual claims to the DCL creditors trust and are entitled to receive their unencumbered pro rata share of the DCL creditors trust along with other creditors holdings, state law, constructive fraudulent conveyance claims who contribute claims to the DCL creditors trust with no pay-over obligation." And it continues in paragraph 17: "Since the DCL plan proposes to enforce contractual subordination of the PHONES, notwithstanding the fact that distributions from the DCL creditors trust are effectively a return of proceeds of direct litigation on behalf of PHONES, it fails the best interest of creditors test by providing the PHONES with less than they would receive in a Chapter 7 liquidation."

We took that objection to heart. As a matter of fact, we thought that our plan the first time around did not provide for the PHONES to be subordinated to creditor stress recoveries if that's not what the PHONES indenture provided, but we wanted to make it crystal clear. So in the chart that we filed last Friday, at document 8607, listing the objections or outstanding objections to the plan, we discussed the Wilmington Trust objection -- let me find the page here -- on page 14. And with respect to this objection, we noted that Wilmington Trust objects to the application of contractual subordination to the creditors trust proceeds, payable to holders of Class 1J creditors trusts. And we said that we were going to amend Class 1J -- amend the plan to provide that the Class 1J creditors trust interests are not subject to PHONES subordination, to the extent that they -- that the indenture does not so provide. And we noted that we believe that this resolved the Wilmington Trust objection. And there's language appended to that document that has proposed plan resolutions. And we also pointed out in our brief that it was never our intention to subordinate PHONES -- creditors trust recoveries to the PHONES to the extent that the indenture did not so provide.

Apparently, having resolved that objection, Wilmington Trust decided that it needed to raise a new one,

which is what you heard today, which has never been articulated before. The argument you heard today, as best I understand it, was that somehow the settlement of estate causes of action embodied in the DCL plan contained a component of state law fraudulent conveyance claims and that that component of recoveries in the settlement is not subject to the PHONES subordination provisions.

Your Honor, I'd love to address that argument. I'm not prepared to address it today, because it's never before been articulated, other than to know that it's wrong. It's wrong under the terms of the indenture, and it's wrong under the bankruptcy law. The recoveries or the state causes of action that are settled under the DCL plan clearly are estate property, and by virtue of them being estate property, they are subject to the PHONES subordination provisions. The PHONES indenture could not be clearer. It says they -- the subordination provisions apply to any distribution of assets of the company, and then it goes on at some length to describe how and why and the ways and the extent to which the PHONES are subordinated.

It's crystal clear that proceeds of avoidance actions in a bankruptcy case are assets of the debtor, and those assets of the debtor are then subject to contractual subordination agreements. I would venture to guess, and I know that none was cited in the brief and no authority was

cited by Mr. Stark today, that there's not a single case out there that provides that avoidance actions or proceeds of avoidance actions recovered by a debtor in a bankruptcy case are not somehow property of the estate and assets of the company. So, I'm handicapped by the inability to respond to an argument that had not been articulated before. I think I'll leave it at that for now.

With respect to the last argument that there are due-process concerns that Wilmington Trust filed a complaint against certain lenders, against Citibank back on March 4, 2010, and that this plan harms that complaint in some way, there's just no issue here, and we made this clear in our brief as well. From the beginning, we've stated that the DCL plan only settles and resolves estate causes of action. To the extent that the Wilmington Trust complaint has -- asserts or alleges personal causes of action, causes of action that do not belong to these bankruptcy estates, Wilmington Trust will remain free to assert them, no matter how frivolous they may be. The only claims settled under the DCL plan are estate plans and causes of action. With that, all of Mr. Stark's due-process concerns, procedural concerns fall away. Confirmation of our plan will not impact any of the causes of action asserted in that complaint to the extent that they are personal.

THE COURT: Thank you.

MR. JOHNSTON: And I believe Mr. Moskowitz has something to say about the new arguments raised by Mr. Stark on the bar order. Otherwise, that's all that I have.

THE COURT: All right.

MR. STARK: Your Honor, I know there's no rebuttals, but I have just been attacked for making stuff up, and it's all clear. I'm happy to walk through it in the brief, and Your Honor can read the objection, but I don't think that's --

MR. JOHNSTON: Your Honor, I would invite you to read the objection; it's not there in the brief at all.

THE COURT: Well, let me hear from Mr. Moskowitz.

MR. MOSKOWITZ: Good afternoon, Your Honor. Elliot Moskowitz for JPMorgan. I will be exceedingly brief.

Mr. Stark levied a glancing blow at the bar order in his argument, and I'm just going to levy a glancing response.

First of all, his argument with respect to the bar order also was absent from his brief, except for one line that carries over from pages 13 to 14, nor was it the subject of any other pleading that's been submitted to the Court.

Having said that, I just want to correct one thing for the record, or amplify it. Mr. Stark complains that we did not settle with him, we did not settle with the

PHONES, and he's receiving nothing under the settlement. I think it's probably more accurate to say, and it's helpful to the analysis, that we did settle with him in the sense that we have a settlement of the estate causes of action that the estate has brought that is being -- that is before the Court. And we've settled those causes of action, including state law avoidance claims. In our capacity as a lender, the money will flow into the estate or money would -- is remaining in the estate as a result of those causes of action. He may not get those monies ultimately because of a separate contractual document that provides for him being subordinated to the notes, but it's not a fair characterization, I think, to say that there's no settlement with his causes of action as part of the DCL plan.

That's all I have to say, Your Honor.

THE COURT: Thank you. Mr. Stark, I'll give you a minute.

MR. STARK: Cybergenics is cited on page 14. The -- it acknowledged the fact that there was mention in the brief about the implications of the DCL plan in our separate litigation. In fact, it's a whole section. I'm sorry that my advocacy didn't marry up specifically to what they intended to say on rebuttal. It's just how I argue. Your Honor, yes, in fact, we were focused on the creditors trust, but the mechanic is the same. And in fact, we never

actually gave to the creditors trust when we ultimately delivered, but the theory and the arguments all are the same respective the litigation trust versus the creditors trust. It's a C versus an L situation.

THE COURT: Thank you. Okay. Are we ready to move onto the PHONES?

MR. SIEGEL: Martin Siegel of Brown Rudnick on behalf of Wilmington Trust as successor indentured trustee for the PHONES.

I rise, Your Honor, because this is our motion for estimation and classification of certain of the PHONES claims. And I'll be brief, because counsel for certain of the noteholders will argue their respective positions. what I want to sort of walk the Court through are what I call the undisputed facts, because we think this can and should be decided as a matter of law.

It's undisputed that the size of the PHONES claims is either 760 million or a million one something. The difference, approximately $403 million, arises from the fact that the PHONES had a provision where certain -- they could be redeemed under certain circumstances for cash.

THE COURT: I remember.

MR. SIEGEL: And prior to the bankruptcy, $403 million worth of PHONES were redeemed, or at least submitted for redemption to the then-indentured trustee, Deutsch Bank.

Deutsch, through a certain mechanism, canceled those certificates, but then Tribune didn't pay. The bankruptcy interrupted the different timing issues. Some were submitted that day. Some were submitted a week before, some a month before, but it wasn't paid. Deutsch sent a letter to Tribune, saying that, in light of the non-payment, we want to withdraw, at least on behalf of certain holders. Tribune wrote back and said, no; as far as we're concerned, it was irrevocable. That was their election. So the way the 760 comes up that's in the debtor plan is, I believe, $703 million worth of face amounts of unredeemed PHONES plus the $56 million that they should have paid but didn't pay for the exchange.

As indenture trustee, we have an issue between our holders, so Wilmington Trust takes no position on the merits of the motion. There are representatives of redeemed holders here and representatives of people who did not redeem, so I'd like to just turn it over to them. As I said, I think the facts that give rise to the dispute are relatively undisputed. Nobody has raised any issues with those facts, so we think that Your Honor, once it hears from the various holders, can and should decide this as a matter of law. Thank you.

MS. STAFFORD: Your Honor, Sarah Stafford, Benesch Friedlander. Speaking on behalf of Barclays and

Waterstone is Jason Sanjana from Latham & Watkins, admitted pro hoc.

MR. SANJANA: Your Honor, Jason Sanjana on behalf of Barclays and Waterstone.

Mr. Rosenberg was here in January, and we went through our arguments pretty carefully, and we briefed them, so I won't belabor the point.

Two things to respond to just now. One, Deutsch Bank was clear at the time that they did not cancel their notes, and that would be consistent with the exchange notice provisions that we cited to you, whereby the holders would tender for redemption; the trustee would hold the notes -- withdraw them, but would only cancel them once the transaction was consummated.

That's really the crux of our argument. We -- there was never any consideration paid. There was never consummation of the transaction, so there was no exchange, and these are just withdrawn, pending reissuance or whatever other remedy is right. But there's really nothing in the documents of the indenture or the note that says that the act of simply submitting them changes their value permanently.

One factual clarification from our response to the motion, we had said that all of the notes held by Barclays and Waterstone were tendered on the petition date.

A very small number, five percent, were actually tendered on December 2. That's still within the 10 days that the exchange notice speaks to, which is the time before -- within which the company can pay.

But in any case, at least clearly for the notes tendered on the petition date, it would be impossible for the company to pay. There's an impossibility that would be a bar to consideration in the transaction.

And the result that we are seeking, that these notes would be valued at their full value, is consistent with the indenture documents, especially the exchange notice, which was specifically crafted to provide for this sort of situation. And it's also consistent with Wilmington Trust's filed proof of claim. So I don't want to go through the arguments again. I think our arguments on subordination were clear. There's really a fundamental difference between subordinating a claim for payment under a note with subordinating a claim based on the sale of a note. And if you look at the cases they cited, one was a stock exchange that was going to be payment for an employment contract. The stock exchange never happened. The other one was a breach of a merger contract -- merger agreement. These are the cases cited by Sutton Brook. And I think it's just not consistent with the cases we cited that say if you were to apply 510(b) subordination to payments under clear

provisions of a note, that would make any claim under a bond based on default or in bankruptcy, really, a 510(b) subordinated claim.

With that, I guess -- unless you have any questions.

THE COURT: I don't. Thank you.

MR. GELBER: Good afternoon, Your Honor. Lawrence Gelber of Schulte Roth & Zabel for Suttonbrook Capital Management.

I agree: we shouldn't rehash everything that we went over in January. But one point that Your Honor raised in January I did want to address. You seemed to frame this as a classification issue, which I don't think any of us had really framed it as. I think our expectation -- and I think I understand what you're saying is that if the exchanging noteholders claims were to be subordinated, you would have disparate treatment of -- you would have senior and subordinated within the same class.

I think our expectation or our anticipation would have been that had Your Honor -- or if Your Honor is to rule that way, the plans could be modified accordingly to set out, you know, a subordinated class for the exchanging -- could make a provision for the exchanging PHONES noteholders.

More importantly, though, I think if the Court

determines that the appropriate amount of those claims is $56 million, you don't even need to get to the classification issue, all right, because then you would just have an additional -- as the debtors say, you would have $759 million in that single class: 703 of non-redeeming and 56 of redeeming. I think, just to remind the Court -- and I think this is where the Court's primary focus should be, to remind the Court, as we pointed out last time, it's our view that the exchanging PHONES holders did everything that they needed to do. They tendered. They signed and delivered the exchange notices. The notes were DWAC'd out of DTC. That's deposit/withdraw at custodian. Once they were DWAC'd out of DTC, the trustee takes possession, and the debtor's books are credited as if those notes are no longer in existence. So the debtor's books would reflect that those notes are no longer outstanding.

The exchanging holders did that with the expectation of receiving $56 million in exchange. They bargained away the risk of non-payment under the PHONES notes for certainty of a payment. Obviously, the bankruptcy intervened, and they didn't receive that payment; yet, the risk/reward analysis that they undertook was it was better for them to exchange and seek the $56 million than risk continued payment under the PHONES at some point in the future.

THE COURT: But timing is everything, isn't it?

MR. GELBER: It certainly is. Having eliminated the risk, it seems to us that it's inequitable that they would still get to reap the reward, although perhaps in this case I don't know how much of a reward it will ultimately be, but there is hope that there will be a substantial distribution to the PHONES noteholders after the litigations are resolved.

So at the point of the exchange, where they have done everything that they needed to do, they have bargained away that risk, and they shouldn't be entitled to that reward. Just because the transaction was not completed, that the consideration was not paid, doesn't mean that the transaction is void. It means that they sold to -- their security to the debtor, the debtor didn't pay for it, and now they have a claim for the amount that they were due to be paid on the sale of that security of the debtor, and that's the $56 million, not the face amount of those claims.

And unless Your Honor has any questions, I have nothing further.

THE COURT: I don't. Thank you. Do either of the plan proponents care to address? Okay.

MR. SANJANA: Not the DCL plan proponents, Your Honor.

THE COURT: Okay. Does that bring us back to Brigade?

MR. PACHULSKI: Thank you, Your Honor. Again for the record, Isaac Pachulski of Stutman, Treister & Glatt, for Brigade Capital Management. To make this hopefully shorter than it might otherwise be, I'm not going to repeat the various objections with the same detail as in our -- the opening argument that we made, it was like about a month ago, and I'll just incorporate that by reference. So my silence on a point shouldn't be deemed a waiver, but there are only -- there are two specific issues I would like to address; namely, the plans violation of the requirement the plan not discriminate unfairly, and the overpayment of the swap claim in connection with converting Oaktree from a plan opponent to a plan proponent. And again I will repeat what I said in opening argument only to the extent necessary to create context because there's some additional points I'd like to establish for the Court regarding these two issues.

First with respect to the requirement that a plan not discriminate unfairly, we pointed out and cited the Court to legislative history, which has subsequently been provided that insofar as the plan gives equivalent treatment to two classes; namely, the senior noteholders, and the other parent claims that have unequal rights under the PHONE subordination. Namely, we have those rights, and the other

parent claims do not. The plan clearly violates the requirement that it not discriminate unfairly because the relative entitlements under subordination provisions has to be reflected in the relative priorities in the relative distributions. In fact, that's the only illustration, the only illustration of not-discriminate-unfairly principle that one finds in the legislative history. Now originally at the time I first argued this, there was only one argument that the debtors had offered, or the plan proponents had offered to justify this treatment. And to summarize, it was basically this is how the settling LBO lenders want to distribute their consideration. And just so that it's clear that I'm not putting words in anyone's mouth, this is how the DCL plan proponents described their arguments in their brief at page 172 of the Confirmation Memorandum. They said, "most importantly" -- "most importantly, the senior lenders have determined that it is in their best interest, as consideration for the settlement of LBO related causes of action to provide for the recovery of Tribune's trade claims and retiree claims as other parent claims." Well as I pointed out then, you can't -- you can't get around the absolute priority rule by making gifts, nor can you get around the requirement of the plan not to discriminate unfairly when you're not even making a gift, but basically these are estate causes of action. They're not causes of

action of the retirees. They're not causes of action of trade creditors. They're estate causes of action, and someone who settles an estate cause of action is supposed to give the consideration to the estate, and then the consideration gets distributed in accordance with the parties bankruptcy entitlement.

Now -- and just to put this in perspective, under their theory, Your Honor, if the senior lenders had said, you know, we want the other parent claims to get a hundred cents on the dollar plus post deficient interest. And you can give the senior noteholders whatever is left. Under their theory, they can do that, and that's simply a violation of the law. It's flagrant. They can't do it that way, and they can't do it in a lesser way either. Now at the conclusion of the hearing on -- of the opening argument, following my remarks, Counsel for Oaktree came up with a new theory to justify this. And according to counsel for Oaktree, at least some of the claims that are classified as other parent claims, including assertively the swap claim, actually do have the benefit of the contractual PHONE subordination. Now preliminarily, Your Honor, I would note that if -- and he didn't say all. He said some. Well, if some other parent claims are entitled to the benefit of that subordination, and some aren't, you have a huge problem of misclassification because you can't classify claims that are

the beneficiaries of subordination with claims that aren't and treat them all the same. So if Counsel is right, you'd have to go plan by plan and figure out which one belongs where, but happily for everyone, we don't have to go through that brain numbing exercise because the fact is that none of the other parent claims, including the swap claim are entitled to the benefit of the contractual subordination. Now the -- preliminarily the indenture is in evidence, and I don't think this is an evidentiary objection. It's construing and unambiguous document without evidence, and I think that's an issue of law. And I believe someone else actually gave the Court a copy of the indenture. It's an exhibit, 0963, but I think the Court has the PHONES indenture.

THE COURT: I have it.

MR. PACHULSKI: And if -- okay. And if the court will turn -- and I'm not sure if the pagination that I have is right, but the definition of senior indebtedness is on page 62, at least in my copy, and it should be around page 62 in the Court's copy. And there's a defined term, senior indebtedness. Okay. Now to be senior indebtedness, you have to be Indebtedness with a capital I. So we have to ask ourselves is the swap claim indebtedness. And now here I'm going to paraphrase. There are four things to qualify as Indebtedness with a capital I. The first is all obligations

represented by notes, bonds, indentures, or similar evidence of indebtedness. The second is all indebtedness for borrowed money or for the deferred purchase price other than on normal trade terms -- and I'm paragraphing -- paraphrasing -- the third is parental payments under a capital lease, and the fourth is for a guarantee of any of the first three items.

Now Your Honor, a swap claim isn't any of these. It's not a claim for borrowed money. If you look at the swap agreement which is actually another exhibit, it's Exhibit 2300, it was filed as part of a proof of claim. It doesn't look anything like a note, a debenture, a bond, or any similar instrument. It's clearly not a rental payment under a capital interest under a capital interest [indiscernible]. And in fact, to confirm what I just said, I think the best thing to do is look at how the DCL proponents, including Oaktree, characterize the swap claim at page 145 of the Confirmation Memorandum. According to them, a fundamental characteristic of an interest rate swap is that the counterparties never actually loan or advance the notional amount. Well, there goes the borrowed money argument. The swap involves an exchange of periodic payments calculated by reference to interest rates and a hypothetical notional amount. Well, that explains why you don't have a note, because you don't even know who's going

to owe who money when or what the amount will be. So that's why you have this convoluted swap agreement and not a simple debenture or bond.

And finally, they say the senior loan claims, on the other hand, are for money loaned. By implication, the swap claims are not for money loaned. So given all of those facts, clearly the swap claims are not entitled to the benefit of the contractual subordination. Now briefly, as to trade payables, the definition of senior indebtedness makes it clear that even if a trade payable is represented by a note, it's still not Indebtedness because a specific carve-out for trade payables in part C of the definition of senior indebtedness. And similarly, retiree claims don't fall into any of these categories. So it's clear that other parent claims were properly classified separately from senior note claims because of none of them is entitled to the benefit of subordination. What was improper is giving them the same treatment.

Now this discussion of the swap claim is a good segue to our second point, which is that -- which has to do with the overpayment of the swap claims. In the opening argument --

MR. JOHNSTON: Your Honor --

MR. PACHULSKI: -- we pointed out that --

THE COURT: Mr. Pachulski, let me ask you to

pause for one moment. Yes, Mr. Johnston.

MR. JOHNSTON: Your Honor, I apologize for interrupting, but this is another bait and switch. This argument regarding the swap claim that Mr. Pachulski's about to unveil, again, was never argued or even mentioned in Brigade's confirmation objection. And I think more importantly, it was argued extensively at length in the noteholders' confirmation objection, and is on the list of issues that the noteholders intend to argue tomorrow. I just don't want to be put in a position, Your Honor, of having to respond to this argument twice. This is not something that is in the Brigade brief. It's more properly considered tomorrow.

MR. PACHULSKI: Your Honor, in the course of -- well, first of all, just so we're clear, on the chart that I was served with that listed our objections, and I don't have handy, but this argument is on the chart as a Brigade objection. So --

MR. JOHNSTON: As a Brigade objection raised in oral argument -- or opening argument, not in the brief.

MR. PACHULSKI: Well, the chart did not distinguish between arguments made orally and in the brief, and at the opening argument, I made it clear that we were joining in the -- we were joining in the noteholder objection on this point, and I amplified the point to

provide legislative history that was not provided. And beyond that, at the close of that argument, Mr. Bennett specifically raised the issue of subordination. Well (a) I couldn't reply at that time, and (b) I thought it would be a good idea to actually read the provision before I responded. So given the fact that Mr. Bennett himself raised the argument claiming that the swap claims were entitled to this subordination, I was entitled to assume that somebody had actually read the subordination provision before they made the argument. Now personally, Your Honor, I don't care if this argument is made today or tomorrow, but I -- but as to the subordination issue of the swap, it was squarely placed at issue by Mr. Bennett at that hearing, and the terms of the subordination agreement -- I'm not asking the Court to consider evidence, and given the fact that the chart assumed that this was an argument I had made, I had assumed it was an argument I would be able to present today. And in fact looking at a copy of today's agenda, one of the specific items under Brigade, and maybe this was handwritten in by someone, I thought was swap.

THE COURT: Well --

MR. PACHULSKI: So if I'm not supposed to make this argument today, I'm sorry, but based on everything I read, I assumed I was.

THE COURT: Well let me ask you to pause for a

moment. I remember at the opening I suggested to you that you supplement your objection to memorialize what you had argued. Did you do that?

MR. PACHULSKI: Excuse me, Your Honor, actually that's -- that's not quite what happened. I asked for permission to supplement my presentation on the not-discriminate-unfairly requirement because it was legislative history that no one had cited. And here I'm paraphrasing. I'm sorry. I don't have the transcript, but you basically said that I could submit a supplement that was simply limited to providing that legislative history because I believe you indicated you didn't want to encourage people to start filing additional briefs at that time. And so I made it clear to the Court, respecting the Court's desire to limit the flood of papers, that I would provide a copy of the legislative history without argument, and that's exactly what I did. I would have been happy to argue in that pleading but my impression was that the Court didn't want me to do it.

THE COURT: Well I fall back into a -- just a principle of how Courts consider arguments, and that is they consider them based upon positions taken on pleadings. And what I hear from Mr. Johnston is that this argument that you're making is not embodied in a pleading of yours. Now you did say, but I haven't read it. You did say you joined

in a pre-existing objection that made this objection.

MR. PACHULSKI: At the time oral -- at the time of opening argument, Your Honor, without objection by anybody, I indicated that in the noteholders' memorandum, and it's towards the end, they had discussed -- and they cited a number of statutory provisions including 1129(b). I pointed out that they had noted that the plan distributions were violative of the waterfall resulting from the subordination provision, and among the provisions they quoted was 1129(b) and I amplified on that. I also argued separately, and this was in -- I argued separately, and this is also something that they had pointed out, that the swap claims were being overpaid; that what had basically happened, and they've chronicled this chronology. I wasn't aware of this chronology until I read it in their paper; that in April of -- April, I think it was 2010, Oaktree opposed a compromise that was then reached. Around June or so, they bought the swap claim. At the time they bought the swap claim, the debtors were going to treat it like any other senior loan claim. It would have received like one and a half cents at the parent level. I then pointed out again, based on what was in the noteholder brief that as part of the settlement in September, in the course of getting Oaktree to become a plan proponent, all of a sudden the swap claim went from being treated as a senior lender

claim to being treated as another parent claim on a parody with all other parent claims and on a parody with our claim. Nobody objected at the time, and it was all based on facts in the noteholder brief. The only thing I've been doing now so far, other than what I said at oral argument, is responding to a specific argument that mischaracterized the terms of the subordination agreement.

MR. JOHNSTON: Your Honor, the key point there was this is all coming straight from the noteholder brief, and presumably we're going to hear it all again tomorrow. We should do this once.

THE COURT: Well --

MR. GOLDEN: Can I be heard one --

THE COURT: Yes, Mr. Golden.

MR. GOLDEN: Thank you. Your Honor, look, I don't -- I resent the notion that this is bait and switch. I had -- we had a personal phone call with Mr. Sottile and Mr. Lantry late last week where we went over in excruciating detail what would be agenda for today's hearing. Mr. Sottile and Mr. Lantry certainly knew that Mr. Pachulski intended to raise the swap argument and the unfair discrimination argument. Whether they failed to communicate that to Mr. Johnston, I don't know, but we're now talking about two of the four DCL plan proponents. So this isn't a question of surprise, and I don't want Mr. Pachulski to be

put in a position that he is doing something inappropriate. If the Court would like, and we want to adjourn this discussion on the swap until after I present it initially, and then allow Mr. Pachulski to weigh in as the joinder, that’s fine, too. But I don’t think the Court should be left with the misimpression that somehow there was a bait and switch occurring here.

THE COURT: Well I don’t want to be drawn....

THE COURT: Well, and I don't want to be drawn into which -- into which I have been drawn --

(Laughter)

THE COURT: -- an argument about the argument. You know I mean the parties here have been given and will be given, you know, multiple opportunities to make their points you know evidentiary, legal, and both. Well, let me put it this way, Mr. Johnston. You don't have to answer today. How's that? Does that solve your problem?

MR. JOHNSTON: If that's the way Your Honor wants to proceed, obviously I have no choice, so --

THE COURT: You don't want to argue it twice and I don't want to hear it twice. I -- you know we're on the same plane there.

MR. JOHNSTON: All right.

(Laughter)

MR. JOHNSTON: I'll hear what Mr. Pachulski has

to say and make a decision then. Thank you.

THE COURT: All right. Mr. Pachulski, you may conclude.

MR. PACHULSKI: And I apologize, I just have to tell you when I read page 15 of their chart of unresolved objections and they said swap claim and they said unfair discrimination, I must have misunderstood something and I didn't mean to create much of a ruckus. I thought my participation in this would take a couple of minutes.

Anyway, let me just get back on my train of thought. All right. So basically with respect to the swap claim, I think we've beaten the unfair discrimination issue to death, but there was also another concern we had raised and I believe the noteholders also raised, which is that the swap claim is being treated as if there were no defenses to the swap claim. It's basically a complete surrender and the theory is that even though the swap claim was an integral part of the LBO transaction, in fact it was required by the credit agreement, that it is subject to other potential defenses that might not be available to the senior lenders. Well, the fact that it might be subject to other defenses might be a grounds for some sort of a settlement, but this wasn't a settlement. It was a complete surrender by the debtors on the point. And I'd like to quote from -- and this will brief, from one part of their brief as to sort of

their theory. At page 147, they point to the fact that the examiner found that it is reasonably likely that a Court would find that the obligations arising from the termination of the swap documents are not avoidable. Now reasonably likely. Now you'll recall earlier in this case when Mr. Sottile was talking about similar language in the context of Mr. Zell's issues. Mr. Sottile stated and I'm quoting here, that is the stuff of litigation. And we agree. We actually agree with Mr. Sottile on this. The problem is it's not right to say that that is the stuff of litigation against Mr. Zell because he opposes the plan and that is the stuff of a complete surrender, which is what happened with Oaktree on the swap claim.

And so the point that I'd like to leave the Court with and now I'm kind of coming full circle, is that there is no justification for what they did with the swap claim, either in terms of treating it on a parody with our claims or in terms of treating it as there were no defenses. They gave the swap claim another $50 million in value at the same time that they coincidentally reduced the distribution to senior noteholders between the April proposal and the October proposal, so this didn't cost the bank anything and this whole history puts us back into the world of Featherworks, which I cited in opening arguments without objection, which is basically we have a situation where the

swap claims were being overpaid, beyond their legal entitlement, simply as a basis to get them to switch from becoming a plan opponent to a plan proponent. And with that I will conclude and thank the Court for its indulgence.

THE COURT: Thank you.

MR. JOHNSTON: Your Honor, I think I'd like to take you up on your invitation and respond to these arguments once I've heard them all with respect to the swap claim, so I'll do it tomorrow.

THE COURT: Very well.

MR. JOHNSTON: Thank you.

THE COURT: All right. Anyone else? Okay.

MR. LEMAY: Your Honor, David LeMay from Chadbourne and Parke for the Creditors Committee. I've been tasked with the unfair discrimination prong of this and it would be convenient for me to deal with all of the unfair discrimination claims, both those raised by the noteholders and those raised by Mr. Pachulski all at once, but I'm perfectly happy to just talk a little bit about Mr. Pachulski's objection since he's lodged it. But I have a different sort of procedural model and that's this, I understand that the ground rule here is that we are here today to talk about legal arguments and non-evidentiary matters. And Mr. Pachulski has made an argument about unfair discrimination and I believe has pitched it as a

purely legal matter. I guess my model, Your Honor, is that it seems to me that the question of unfair discrimination in the Third Circuit involves a threshold inquiry about whether the discrimination is material. And why do I say that? I say that that's that -- I say that because that's what the District Court in Armstrong, later affirmed by the Third Circuit, tells us. So Mr. Pachulski's legislative history is good, but I think Armstrong, Third Circuit Law, is better and that Third Circuit Law sends us into a fact question. And the fact question turns out to have been answered by Mr. Whitman in his testimony. I'm not sure and I don't want people yelling at me, whether I'm supposed to talk about that. But there's no way that I can meaningfully address the Armstrong materially test without adverting to the evidence. And so I thought I'd pause for a moment and ask Your Honor what you'd like me to do.

THE COURT: I can't imagine anyone would yell at you, Mr. LeMay.

(Laughter)

THE COURT: But you may proceed.

MR. LEMAY: Thank you, Your Honor. I and so the question of unfair discrimination that's been raised by Mr. Pachulski is not simply a pure application of statutory law in the way that absolute priority on cram down is. It's become very clear and I believe Mr. Pachulski has perhaps

inadvertently conflated a couple of different threads in the law, but it's become very clear in the light of recent jurisprudence that testing unfair discrimination as between two equal classes is a different exercise than testing for absolute priority when something goes to a junior class over an intervening dissenting class. Here there is no intervening dissenting class, there's no junior class. Mr. Pachulski's problem is he says that the parent general unsecured creditors have gotten more than they ought to have at the expense of the bondholders. And I think it's pretty clear under modern law that that does not involve the application of the very strict kind of rules that pop up when you're dealing with absolute priority, but rather a more subtle test which grew out of a publication by a Professor Markell that was published -- I'm sorry -- that was picked up by a number of Courts, including the Armstrong Court, which looks at unfair discrimination in the context of two parallel classes from the point of view first of all of is there discrimination and is it material? And in that context the progeny of the cases under that four part test make it very clear that in viewing unfair discrimination, the level of discrimination or the level of change has to be grossly disproportionate. There's a case called Great Bay which says that Courts that have rejected confirmation on the basis of unfair discrimination have confronted plans

proposing grossly disparate treatment, 50 percent or more, to similarly situated creditors. And there are other cases along the same line. What all those cases tell you, Your Honor, is that before you even need to engage meaningfully on this issue, you've got to find that there is A, discrimination and B, that it's meaningful.

THE COURT: Well --

MR. LEMAY: Now --

THE COURT: -- let me ask you to pause there. This is the Markell I guess proposal, who was then a professor at the time and then I think I discussed in Exide, but didn't adopt. I don't know that the circuit here has adopted it yet, now Judge Markell.

MR. LEMAY: Well, it was I think adopted by the District Court in Armstrong and of course that was affirmed. The District Court in Armstrong sets forth the standard, cites to the article, and then the District Court says, having set forth that article, if there is an allegation of a materially lower percentage recovery, the presumption can be rebutted by showing that and then it goes on to show how you rebut the presumption. But I take it from the District Court and its opinion that since it engaged in the materiality analysis, that it must have adopted the reasoning behind that test and the need for materiality, because they wouldn't have done the exercise that they did.

THE COURT: Okay. And what you're telling me is that it's a persuasive Decision, but not a controlling Decision on this Court.

MR. LEMAY: I'd say that's true, yes. I didn't mean to suggest that it was --

THE COURT: No, because it was not the focus of the appeal of the Appellate --

MR. LEMAY: That's absolutely right, Your Honor.

THE COURT: Okay.

MR. LEMAY: No. And I certainly wouldn't mean to oversell the case, but I do think it's the right way to go and I think it's the way that the modern trend in these unfair discrimination cases has gone, to distinguish on the one hand between a very strict rule on gifting in the absolute priority context and a somewhat different unfair discrimination thing. So I didn't mean to oversell it and I'm not suggesting that it's binding Third Circuit Law. I do think that it is the best way of thinking about these issues.

At any rate, Your Honor, that then brings us to the factual issue. Your Honor will remember that Mr. Whitman testified. His testimony was unrebutted. I don't think there's any other testimony in the record. And Mr. Whitman's testimony on direct examination was that the -- in effect the net harm suffered by the senior noteholders was

in the vicinity of $40,000. There was on cross examination and I can give page cites if that's helpful. There was on cross examination a little bit of an attempt to sort of have at him on that, but I believe his testimony is quite consistent that the harm to the bondholders that's being complained of as a factual matter is in the range of $30,000 to $40,000. As I say, that testimony I believe is the only testimony on the record in the issue. And so if that's the case, I think we are infinite worlds away from the kind of material harm or gross disproportionality that the cases talk about and that therefore this is much ado about nothing.

The other thing I would point out is I guess that to the extent that the Court later finds that the settlement is a reasonable settlement and that the economic justification for the settlement makes sense, then it is going to be correct to say that what happened and Mr. Pachulski disputes this, that what in effect happened here is that the senior lenders parted with a piece of their recovery to bring the parent general unsecured creditors up to the same level as the bondholders. Now to be sure, if the Court later finds that the settlement itself doesn't pass muster, then that won't work. But at that point we all have much larger problems and so I think it's a -- I think it's actually a footnote. So for all those reasons, Your

Honor, I think that this can be disposed of relatively easily, this issue of unfair discrimination, by simply focusing on issues of materiality and the size of the amounts involved. So that's my pitch on unfair discrimination. As to the Brigade objection, I guess you might hear a somewhat similar theme from me tomorrow, but I won't repeat myself.

THE COURT: Thank you. Anyone else? Okay. Have we reached the end of the third party objections?

MR. SOTTILE: We have, Your Honor.

THE COURT: Well, of the argument anyway. Okay. Is there any further business for today?

MR. SOTTILE: Not on the side of the DCL plan proponents, Your Honor.

MR. GOLDEN: None here, Your Honor. Just what time are we -- I'd like to know what time we are planning to restart tomorrow.

THE COURT: I'm glad you asked that question. 10:00. I have a matter that I heard -- that I scheduled on short notice for 9:30 tomorrow morning and because it's on short notice, objections are not due until the time of hearing, although I'm supposing given the nature of the relief that's been requested that objections are unlikely, but it's been a contested case, so I won't promise you anything. I just ask that when we're going through that

proceeding as parties move in and out of the courtroom to get ready for 10:00 that they do so with consideration for those before the Court.

Okay. Let me just give you -- cover some other things. I've received and reviewed both of the letters and I'm perfectly okay with what's been proposed with respect to I guess I'll call them the afternoon arguments, although we can start in the morning if we get you know -- get that far. (Laughter)

THE COURT: But each side has proposed. I have nothing to add to that. I think I am going to allow short, maybe in letter form, post-hearing submissions by other objectors whose objections I did not resolve from the bench today. So I haven't decided anything other than what I've just told you, so the parties can think about that overnight and if someone wants to comment on that tomorrow they're welcome to.

I also -- well, again something for the parties to think about, but I'd like to find a way somehow to get everything teed up in such a way that I have all of the written submissions prior to the commencement of closing argument and we'll talk about a date in a minute. And by that I mean I think I am going to ask for submission of proposed findings and conclusions. And given the timeframe which will exist between the end of the day tomorrow and the

briefing schedule and closing arguments, I also assume and/or encourage final amendments to the proposals to the extent certain of the objections that were not resolved today can be resolved by language changes to the respective plans and find a way to get them to the Court early enough that I can have a full understanding of exactly where everyone is because at some point you know we're going to have to freeze time and the other reason for that is obvious I'm sure.

Finally, let me just throw out a couple of suggestions for dates. The briefing proposal has the last submission May 27. I will tell you the next available time beyond June 3, which I think is way too close to the submissions, is the week of June 13. And I would propose to make, assuming closing can be had in a day, either the 14th or 15th of June available for that. I do have something scheduled for those days now and I've yet to inform the soon to be unhappy parties that they're not trying their case that week. But I felt in balancing the respective urgencies I wanted to clear some time for closing here. So think about those dates and see if the parties can agree upon one. And if for any reason they are not suitable, we'll try something else. All right. Are there any questions? All right. Thank you all very much. That concludes today's session. Court will stand adjourned.

(Whereupon, at 5:03 p.m., the hearing was adjourned.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Traci Calaman Digitally signed by Traci Calaman DN: cn=Traci Calaman, c=US, o=DiazDataServices, ou=DiazDataServices, email=info@diazdata.com Date: 2011.04.14 14:16:10 -04'00' — 14 April 2011

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Word	Page:Line

A507

A508

Word	Page:Line

Word Page:Line

Word Page:Line

Word	Page:Line

A522

A529

Word Page:Line

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